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No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

HARVEY F. EUGE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States of America and Patrick J. Finnessey, Special Agent of the Internal Revenue Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The order of the district court (App. A, *infra*, 1a-3a) is not reported. The opinion of the court of appeals (App. B, *infra*, 4a-9a) is reported at 587 F.2d 25.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 10a-11a) was entered on November 22, 1978. On February 8, 1979, Mr. Justice Blackmun entered an order extending the time within which to file a petition for a writ of certiorari to and including March 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Internal Revenue Service has statutory authority to issue a summons requiring a person to appear and execute handwriting exemplars in aid of an administrative investigation to determine his correct tax liability.

STATUTES INVOLVED

The pertinent provisions of Sections 7601, 7602, and 7604 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in Appendix D, *infra*, 12a-13a.

STATEMENT

1. In October 1977, Special Agent Patrick J. Finnessey of the Intelligence Division of the Internal Revenue Service was assigned, together with a revenue agent, to investigate respondent's income tax liabilities for the years 1973-1976. The case had been referred to him by the Audit and Collection Divisions of the Service after a search revealed that respondent had neither filed nor sought any extensions to file a

tax return for any of the years in question (App. B, *infra*, 7a; Tr. 3-6).[1] The Service had initially determined that respondent's primary source of income was from preparing tax returns (Tr. 5). An advertisement placed by respondent in the classified telephone directory read: "Euge, Harvey F., get 'em back money tax man, prepared in your home, appointment only. Tax review and rework makes you money" (Tr. 6).

In order to determine respondent's correct tax liability for the years under examination, the agents employed the bank deposits method of reconstructing his income. Under this well-established method of indirect proof, the Service scrutinizes bank deposits to determine whether they represent taxable income and subtracts any non-income items. The investigation disclosed that there were only two bank accounts in respondent's name. However, during his investigation, Special Agent Finnessey became aware that statements of 20 other bank accounts were sent to post office boxes in respondent's name, that the signature cards of these accounts listed addresses of properties owned by respondent, and that there were frequent transfers of funds between these accounts. These facts suggested to the agent that respondent had other bank accounts under aliases to conceal his taxable income (Tr. 7-8). For 1975 and 1976, the deposits in these other bank accounts were approximately $50,000 and $30,000, respectively (Tr. 9).

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[1] "Tr." refers to the transcript of proceedings in the district court held on April 10, 1978. We are lodging a copy of the transcript with the Clerk.

As a result of these disclosures, Agent Finnessey issued a summons to respondent requiring him to complete a standard IRS handwriting exemplar form and to execute exemplars of the various signatures on the bank signature cards. After receipt of this data, the Internal Revenue Service handwriting laboratory would be able to determine whether respondent had maintained bank accounts under assumed names (Tr. 10-12).

At the time Agent Finnessey served the summons on October 7, 1977, respondent told him that he would not obey it (Tr. 9-10; App. B, *infra*, 7a). Accordingly, the United States and Agent Finnessey commenced this action under 26 U.S.C. 7604(a) in the United States District Court for the Eastern District of Missouri to enforce the summons (App. B, *infra*, 7a-8a). At an evidentiary hearing held by the district court on April 10, 1978, Agent Finnessey testified with respect to the purpose of the investigation, the relevancy to that inquiry of the information sought by the summons, and the administrative procedures taken by him to obtain voluntary compliance (App. A, *infra*, 1a-2a). The agent stated that "[w]e need [the handwriting] exemplars to match the signature cards for the accounts" (Tr. 10) so that the Service could establish whether respondent was maintaining bank accounts under assumed names. At the request of the attorney for the government, the agent prepared a list of aliases that he required in order to complete his investigation (Tr. 11).

The district court ordered the summons enforced. Specifically, it ordered respondent to complete the Treasury Department Handwriting Exemplars form to be submitted by Agent Finnessey, and to provide 10 handwriting exemplars of eight different signatures (App. A, *infra*, 2a).

The court of appeals reversed (App. B, *infra*, 4a-9a). By a 7-1 *en banc* vote, it overruled its prior (divided) panel decision in *United States* v. *Campbell*, 524 F.2d 604 (1975), which had held that "[t]he Commissioner's statutory authority to summon 'other data' under Title 26, U.S.C., § 7602(2), includes the authority to require the taxpayer to give exemplars of her handwriting" (*id.* at 607). After reviewing the conflicting authorities (see App. B, *infra*, 8a-9a), the court of appeals concluded that "the view expressed in the dissenting opinion in *Campbell* is the preferable one and should be followed in this case and in the future unless the Supreme Court holds otherwise or unless Congress changes the law" (*id.* at 9a; footnote omitted). The view of the dissent in *Campbell* adopted by the court was that the compelled execution of a handwriting exemplar is a search and seizure within the meaning of the Fourth Amendment and that "[t]hose charged with investigative and prosecutorial duties should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks" (524 F.2d at 609).

The dissenting judge in the instant case would have enforced the summons "for all of the reasons

expressed in [the majority opinion in] *United States* v. *Campbell*, [*supra*]" (App. B, *infra*, 9a). As that decision observed, Sections 7601 and 7602 of the Code gave the Internal Revenue Service a broad mandate to investigate and audit persons who may be liable for taxes and the fact that an internal revenue summons can be enforced only by the courts after an adversary proceeding provides substantial protections aaginst abuse (see 524 F.2d at 607).

REASONS FOR GRANTING THE PETITION

The court of appeals wrongly decided an issue of major importance to the conduct of federal tax investigations, and its decision conflicts with that of the Fourth Circuit in *United States* v. *Rosinsky*, 547 F.2d 249 (1977).

1. The court of appeals' ruling that the Secretary's summons power does not extend to requiring a person to appear and execute handwriting exemplars in aid of a tax investigation has no basis in either the statutory text or in tax enforcement policy.

The Internal Revenue Service is organized to carry out the broad responsibilities of the Secretary of the Treasury, as set forth in Section 7801(a) of the Internal Revenue Code of 1954, to administer and enforce the internal revenue laws. Our tax collection system depends primarily upon honest self-reporting. However, in order to encourage and supplement accurate and conscientious self-reporting by all taxpayers, Congress has directed the Internal Revenue Service in Section 7601 of the Code to canvass "each

internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax" (App. D, *infra*, 12a). See also *Donaldson* v. *United States*, 400 U.S. 517, 523-524 (1971).

In discharging this duty to canvass and to inquire, the Internal Revenue Service has been granted broad statutory powers to examine books and witnesses through the issuance of summonses. Specifically, Section 7602 authorizes the Secretary or his delegate "[t]o examine any books, papers, records, or other data which may be relevant or material to such inquiry; * * * [and] [t]o summon * * * any person having possession, custody, or care of books of account * * * or any other person * * * to appear before the Secretary * * * at a time and place named in the summons and to produce such books, papers, records, or other data, * * * as may be relevant or material to such inquiry * * *" (App. D, *infra*, 12a-13a).

This Court has consistently recognized that effective, and therefore fair, administration of the tax laws requires that internal revenue agents not be fettered in their good faith use of the investigatory tools that Congress has provided them to determine the liability of taxpayers. In holding in *United States* v. *Bisceglia*, 420 U.S. 141 (1975), that the Internal Revenue Service has the statutory authority to issue a "John Doe" summons to a bank or other depository to discover the identity of a person who may be liable for unpaid taxes, the Court observed that "[i]t would seem elementary that no meaningful investiga-

tion of such events could be conducted if the identity of the persons involved must first be ascertained, and that is not always an easy task. * * * [I]f criminal activity is afoot the persons involved may well have used aliases or taken other measures to cover their tracks. Thus, if the Internal Revenue Service is unable to issue a summons to determine the identity of such persons, the broad inquiry authorized by § 7601 will be frustrated in this class of cases" (*id.* at 150).

The Court's opinion in *Bisceglia* relied in large part upon the analogy between the Commissioner's summons power and the authority of the grand jury to compel production of evidence. As the Court noted, "had respondent been brought before a grand jury under identical circumstances there can be little doubt that he would have been required to testify and produce records or be held in contempt" (*id.* at 147). In support of this proposition, the Court cited its earlier statement in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950), quoted thereafter with approval in *United States* v. *Powell*, 379 U.S. 48, 57 (1964), that the subpoena power of federal enforcement agencies is "more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." The summons authority of the Internal Revenue Service is essentially identical to the broad inquisitorial powers of the other federal enforcement agencies. "While the

power of the Commissioner of Internal Revenue derives from a different body of statutes, we do not think the analogies to other agency situations are without force when the scope of the Commissioner's power is called into question." *United States* v. *Powell*, *supra*, 379 U.S. at 57 (footnote omitted).

Finally, the Court noted in *Bisceglia* (420 U.S. at 146) that Congress has afforded summoned parties substantial protection by providing that an internal revenue summons is not self-executing but can be enforced only by the courts. See Section 7604(a). Thus, before the Commissioner can compel the production of evidence or the appearance of a witness, the summoned party is entitled to an adversary proceeding to consider his objections to enforcement. At the hearing he "may challenge the summons on any appropriate ground." *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964). "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *United States* v. *Powell*, *supra*, 379 U.S. at 58 (footnote omitted). After reviewing the pertinent authorities, the Court in *Bisceglia* concluded (420 U.S. at 146-147) that "[t]he cases show that the federal courts have taken seriously their obligation to apply this standard to fit particular situations, either by refusing enforcement

or narrowing the scope of the summons. See, *e.g.*, *United States* v. *Matras*, 487 F.2d 1271 (CA8 1973); *United States* v. *Theodore*, 479 F.2d 749, 755 (CA4 1973); *United States* v. *Pritchard*, 438 F.2d 969 (CA5 1971); *United States* v. *Dauphin Deposit Trust Co.*, 385 F.2d 129 (CA3 1967)."

2. In holding that the Internal Revenue Service has no statutory authority to issue a summons compelling the execution of handwriting exemplars, the court of appeals overruled its prior decision in *United States* v. *Campbell*, *supra*, and adopted the view expressed in the dissenting opinion in that case.

But the dissent in *Campbell* was based on the erroneous premise that a summons requiring handwriting exemplars is a search and seizure within the meaning of the Fourth Amendment. As this Court made clear in *United States* v. *Dionisio*, 410 U.S. 1 (1973), and *United States* v. *Mara*, 410 U.S. 19 (1973), a grand jury subpoena requiring appearance is not a "seizure" within the meaning of the Fourth Amendment and that Amendment is not violated by a directive compelling production of "physical characteristics" that are "constantly exposed to the public" (410 U.S. at 9, 14) such as voice or handwriting exemplars. "Handwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice" (*id.* at 21). The Court therefore held in *Mara* that "[t]he specific and narrowly drawn directive requiring the witness to furnish a specimen of his

handwriting violated no legitimate Fourth Amendment interest" (*id.* at 22; footnote omitted).

Given the analogy between the grand jury subpoena and the internal revenue summons, there is no basis for the rejection by the dissent in *Campbell* of the precedential force of *Mara* and *Dionisio* to the question presented in the instant case. The dissenting judge in *Campbell*, whose view was adopted by the decision below, stated that the analogy was "unconvincing" because "[t]here is no direct supervision of an Internal Revenue Service investigation by a judge or other neutral judicial officer as there is of a grand jury" (524 F.2d at 609).

But just as a grand jury subpoena can be enforced only by a court, the Internal Revenue Service can compel compliance with its summonses only by invoking the jurisdiction of the federal district court. See 26 U.S.C. 7604(a). Moreover, the rules set forth in this Court's decisions in *United States* v. *Powell*, *supra*; *Donaldson* v. *United States*, *supra*; and most recently in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), for enforcement of an IRS summons, eliminate the possibility of abuse of this vital investigative tool. The analogy between the grand jury subpoena and the internal revenue summons is therefore sound. In both cases, "Congress has provided protection from arbitrary or capricious action by placing the federal courts between the Government and the person summoned." *United States* v. *Bisceglia*, *supra*, 420 U.S. at 151. Cf. 28 U.S.C. 1826(a). The constitutional concerns evinced by the

court below with respect to summoned production of handwriting exemplars are accordingly groundless.

3. The foregoing considerations have led the Fourth Circuit in *United States* v. *Rosinsky, supra,* to uphold enforcement of the type of summons at issue here. *Rosinsky* involved a summons requesting a person under investigation to complete handwriting exemplars to enable the Internal Revenue Service to determine whether he issued certain invoices and cashed certain checks. In upholding enforcement of the summons, the Fourth Circuit concluded that the authority in 26 U.S.C. 7602(2) to require the witness to "appear" "impliedly carries with it the power to require certain nontestimonial acts on the part of the witness such as providing handwriting or voice exemplars" (547 F.2d at 252). As the court reasoned, "[s]ince the power under the § 7602 summons is 'essentially the same as the grand jury's,' it seems obvious that * * * the appellant may be compelled * * * to give handwriting exemplars" (*id.* at 252-253).

Moreover, *Rosinsky* found the reasoning of the panel decision in *United States* v. *Campbell, supra,* overruled by the decision below, "consonant with what the Supreme Court later said in *Bisceglia* * * *" (547 F.2d at 253 n.3). In *Campbell,* the Eighth Circuit had previously held that handwriting exemplars fell within the term "other data" in 26 U.S.C. 7602.[2]

[2] Cf. *Palmer* v. *United States,* 530 F.2d 787, 789 (8th Cir. 1976), and *In re Lopreato,* 511 F.2d 1150, 1153-1154 (1st Cir. 1975). These decisions hold that handwriting exemplars are "other information" or "other material" under 28 U.S.C. 1826(a), the statute authorizing district courts to compel compliance with grand jury subpoenas and court orders "to testify or provide other information, including any book, paper, document, record, recording or other material."

On the other hand, in holding that the Service's summons power does not extend to handwriting exemplars, the Sixth Circuit in *United States* v. *Brown,* 536 F.2d 117, 121-122 (1976), which the decision below characterized as reaching "[t]he directly opposite result" from *Campbell* (App. B, *infra,* 8a), rejected that construction of the statute. Thus, as matters now stand, the type of summons at issue in this case is enforceable in the Fourth Circuit but not in the Sixth or Eighth Circuits.

4. The question presented is important to the administration and enforcement of the revenue laws. Without the power to require the execution of handwriting exemplars, the Internal Revenue Service cannot effectively conduct investigations in cases where, as here, a determination of the identity of the author of documents is critical to the inquiry. We are advised by the Internal Revenue Service that handwriting exemplars have been used in the investigation of 320 cases during the 18-month period ending on December 6, 1978. In a number of these cases, handwriting exemplars were produced voluntarily.[3] How-

[3] The question whether the Internal Revenue Service may compel the execution of handwriting exemplars is producing an increasing amount of litigation. See *United States* v. *Ginsburg,* No. C 78-6028 (E.D. Ark. Jan. 8, 1979); *United States* v. *Lewis,* 42 A.F.T.R.2d 5821 (N.D. Tex. July 11, 1978);

ever, if the decision below is permitted to stand, it may be expected that voluntary production of handwriting exemplars will decline and many investigations into suspected tax abuse will thereby be adversely affected.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1979

United States v. *Hoopingarner*, 438 F. Supp. 366 (N.D. N.Y. 1977); *United States* v. *Bassman*, 40 A.F.T.R.2d 5990 (S.D. Iowa Sept. 1, 1977).

* The Solicitor General is disqualified in this case.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 78-MISC-0004-C

UNITED STATES OF AMERICA and PATRICK J. FINNESSEY, Special Agent of the Internal Revenue Service, PETITIONERS

v.

HARVEY F. EUGE, RESPONDENT

ORDER

This matter comes before the Court upon the Petition to Enforce Internal Revenue Service Summons, brought by the United States of America on behalf of the Internal Revenue Service, and Patrick J. Finnessey, a Special Agent of the Internal Revenue Service. On April 10, 1978, an evidentiary hearing was held. Prior to this hearing, the United States filed a Motion to Suspend and Limit Discovery, and a Motion to Quash Notice to Take Deposition, with a supporting memorandum of law. Thereafter, respondent Euge filed a Motion to Compel Discovery and for Continuance to Permit Discovery, with a supporting memorandum.

At the evidentiary hearing on April 10, 1978, Special Agent Finnessey testified to the purpose of the investigation of respondent, the relevancy of the information sought by the Internal Revenue Service

Summons to that inquiry, and the administrative procedures taken to obtain voluntary compliance with the summons. The witness was cross-examined by counsel for the respondent, and by this Court.

Having examined the pleadings and memoranda filed by the parties hereto, and having heard the testimony of Petitioner Finnessey,

IT IS HEREBY ORDERED that the Motion of Petitioners to Suspend and Limit Discovery, and the Motion to Quash Notice to take Deposition, be granted;

IT IS FURTHER ORDERED that the respondent's Motion to Compel Discovery and for Continuance to Permit Discovery, be denied;

IT IS FURTHER ORDERED that respondent Harvey F. Euge obey the Internal Revenue Service Summons dated October 7, 1977, by providing handwriting exemplars in the following manner:

(a) By completion of the Department of the Treasury Handwriting Exemplars form to be provided by Special Agent Patrick J. Finnessey, and

(b) By providing ten handwriting exemplars of the following signatures: (1) Robert Wells, (2) Sam Flanders, (3) Richard Sappington, (4) Larry R. Anderson, (5) James I. Campbell, (6) Frank J. Rollins, (7) John M. Leadbetter, and (8) John L. Neals. These exemplars shall be given in the manner and form prescribed by Special Agent Patrick J. Finnessey.

IT IS FURTHER ORDERED that respondent Harvey F. Euge comply with the terms of this Order within ten days.

Dated this 13th day of April, 1978.

/s/ H. Kenneth Wangelin
H. KENNETH WANGELIN
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1284

UNITED STATES OF AMERICA and PATRICK J. FINNESSEY, Special Agent for the Internal Revenue Service, APPELLEES

v.

HARVEY F. EUGE, APPELLANT

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: October 18, 1978

Filed: November 22, 1978

Before GIBSON, Chief Judge, LAY, HEANEY, BRIGHT, ROSS, STEPHENSON, HENLEY and McMILLIAN, Circuit Judges, *En Banc.*

HENLEY, Circuit Judge.

This appeal which comes to us from the United States District Court for the Eastern District of Missouri [1] raises again the question of whether § 7602 of the Internal Revenue Code, 26 U.S.C. § 7602, authorizes the Internal Revenue Service to require a taxpayer whose potential tax liabilities are under investigation to appear before a Special Agent of the Service and to furnish multiple handwriting exemplars to the Special Agent for comparison purposes. A majority of this court answered that question in the affirmative in *United States* v. *Campbell*, 524 F.2d 604 (8th Cir. 1975).[2] The question having recurred in this case, the court deemed it well to hear this appeal *en banc* and has done so.

26 U.S.C. § 7602 is as follows:

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of an internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

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[1] The Honorable H. Kenneth Wangelin, United States District Judge.

[2] The decision in *Campbell* was by a divided court. In due course rehearing and rehearing *en banc* were denied. *Campbell* was cited by us as authority in *Palmer* v. *United States*, 530 F.2d 787, 789 (8th Cir. 1976), a case involving the power of a federal grand jury to require a witness to provide handwriting exemplars.

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Where a taxpayer fails or refuses to obey an administrative subpoena issued by an agent of the IRS, the subpoena may be enforced by a judicial proceeding in the appropriate district court as provided by 26 U.S.C. § 7604, which is as follows:

> (a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

> (b) Enforcement.—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States Commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

There is no dispute about the facts of the case. In October, 1977 Special Agent Finnessey was investigating the tax obligations of respondent Harvey F. Euge for the tax years 1973, 1974, 1975 and 1976, and in connection with that investigation Special Agent Finnessey served a subpoena on Euge pursuant to § 7602 commanding the taxpayer to appear and furnish handwriting exemplars.

Respondent advised the Special Agent that he had no intention of complying with the subpoena and did not do so. This action was commenced under § 7604

on January 12, 1978; an order to show cause was issued by the district court on January 13. Various proceedings were had in the district court in connection with discovery that respondent desired to pursue.

On April 13, 1978 the district court entered an order resolving the discovery issues against the respondent and ordering the respondent to comply with the subpoena within ten days. This appeal followed.

The question of whether § 7602 authorizes the IRS to require a taxpayer to create a document by giving handwriting exemplars as contrasted to the question of whether the Service can compel the taxpayer to produce for examination an existing piece of writing or document has not been free from doubt, and, as has been noted, it divided this court in *Campbell*, *supra*, in 1975.

In coming to its conclusion in *Campbell*, the majority of the court analogized the power of the Service to compel the giving of handwriting exemplars to the corresponding power of a federal grand jury. *See United States* v. *Mara*, 410 U.S. 19 (1973); *Palmer* v. *United States*, 530 F.2d 787 (8th Cir. 1976).

The Court of Appeals for the Fourth Circuit took the same approach that the majority of this court took in the *Campbell* case in *United States* v. *Rosinsky*, 547 F.2d 249 (4th Cir. 1977). The directly opposite result was reached in *United States* v. *Brown*, 536 F.2d 117 (6th Cir. 1976). The *Brown* case was cited with approval in somewhat different context in *United States* v. *Davey*, 543 F.2d 996,

1000 (2d Cir. 1976), wherein it was said that § 7602 does not require "preparation or production of records not yet in existence."

This *en banc* court has given the problem careful consideration, and we conclude that the view expressed in the dissenting opinion in *Campbell* is the preferable one and should be followed in this case and in the future unless the Supreme Court holds otherwise or unless Congress changes the law.[3]

Other questions raised by respondent do not survive our determination of the basic question.

The order of the district court is reversed, and the cause is remanded with directions that the administrative subpoena or summons be quashed.

STEPHENSON, Circuit Judge, dissenting.

I respectfully dissent for all of the reasons expressed in *United States* v. *Campbell*, 524 F.2d 604 (8th Cir. 1975).

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

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[3] Our holding is limited to the precise question before us, namely, whether or not the IRS has the authority under the statute here involved to compel a taxpayer to create out of thin air handwriting exemplars by using his brain, eyes and hand. We do not have here any question of the authority of the Service to require a taxpayer to retrieve raw data, such as that which may be in the workings of a computer. *Cf. United States* v. *Davey*, *supra*, 543 F.2d 996.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1284

SEPTEMBER TERM, 1978

UNITED STATES OF AMERICA and PATRICK J. FINNESSEY, Special Agent for Internal Revenue Service, APPELLEES

vs.

HARVEY F. EUGE, APPELLANT

JUDGMENT

APPEAL FROM the United States District Court for the Eastern District of Missouri.

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the Eastern District of Missouri and briefs of the respective parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court with directions in accordance with this Court's majority opinion.

Costs taxed in favor of Appellant:

Costs of reproducing brief:	$ 63.00
Costs of reproducing reply brief:	$ 47.25
Total costs of Appellant for recovery from Appellee in the U.S. District Court:	$110.25

A true copy:

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

/s/ Robert A. Tucker

November 22, 1978

APPENDIX D

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.

(a) *General Rule.*—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

SEC. 7602. EXAMINATIONS OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the

business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

* * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 286516 316

Supreme Court, U. S.
FILED
JUN 28 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1453

UNITED STATES OF AMERICA, ET AL.,
Petitioners

—*v.*—

HARVEY F. EUGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ~~SEVENTH~~ Eighth CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 19, 1979
CERTIORARI GRANTED MAY 14, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1453

UNITED STATES OF AMERICA, ET AL.,
Petitioners

—*v.*—

HARVEY F. EUGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ~~SEVENTH~~ Eighth CIRCUIT

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* The opinion and judgment of the United States Court of Appeals for the Eighth Circuit have not been reproduced, but are available at pages 4a through 11a of the Petition for a Writ of Certiorari.

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 78-1284

Appeal from the Eastern District of Missouri

UNITED STATES OF AMERICA and PATRICK J. FINNESSEY, Special Agent for Internal Revenue Service, APPELLEES

vs.

HARVEY F. EUGE, APPELLANT

Attorneys for Appellant
James W. Erwin

Attorneys for Appellee
Robert D. Kingsland, US Atty.
Wesley D. Wedemeyer, Asst US Atty
Carleton D. Powell
Richard D. Buik
Daniel F. Ross

No. below: 78-Misc. 0004C(2)

Judge below: Wangelin

Date of Order: 4/13/78

Notice of appeal filed: 4/21/78

DATE	PROCEEDINGS

1/12/78—PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS—fld., with attached exhibit A & B

1/13/78—ORDER TO SHOW CAUSE—fld., it is ordered that Harvey F. Euge appear before the Dist. Court of the U.S. for the Eastern Dist of Mo. in that branch thereof presided over by the undersigned in his courtroom on Feb. 6, 1978 at 10:00 a.m. Ordered that copies of this Order,

DATE	PROCEEDINGS

the Petition & Exhibit be served upon the respondent on or before the 23rd of Jan. 1978. Ordered that with in (10) days after service of copies of this Order Petition & Exhibit upon him the respondent & any party intervening herein shall file & serve a written response to the Petition, & Ordered that Special Agent Patrick J. Finnessey IRS to serve copy upon respondent (HKW)

2/6/78—RETURN ON ORDER TO SHOW CAUSE—fld., served on Harvey F. Euge on 1/13/78

2/6/78—ORDER OF ATTACHMENT FOR ARREST—fld., (HKW)

2/8/78—ORDER—fld., it is ordered that the Order & return of attachment for arrest are dissolved & the respondent Harvey F. Euge is released from custody the Order to Show Cause is continued to Feb. 13, 1978 at 10:00 a.m., at which time the respondent is ordered to appear and make his return together with counsel appointed for him in this matter (HKW) CC: to attys

2/13/78—DEFT FAILS TO APPEAR. DEFT APPOINTED COUNSEL PRESENT. ORAL MOTION OF DEFT FOR 7 DAYS TO REPLY TO PETITION. COURT GRANTS DEFT UNTIL FEB. 17, 1978 TO REPLY TO PETITION. DEFT IS TO APPEAR NOT LATER THAN FEB. 27, 1978.

2/17/78—ANSWER TO PETITION TO ENFORCE INTERNAL REVENUE SUMMONS—fld.,

2/17/78—RESPONDENT'S INTERROGS TO PETITIONERS—fld.,

3/1/78—NOTICE TO TAKE DEPO OF PATRICK J. FINNESSEY fld.,

2/17/78—REQUEST FOR PRODUCTION OF DOCUMENTS—fld., by respondent

2/17/78—MOTION TO SHORTEN TIME FOR DISCOVERY & FOR CONTINUANCE TO PERMIT DISCOVERY WITH MEMORANDUM IN SUPPORT—fld., by respondent

DATE	PROCEEDINGS

2/27/78—BY LEAVE OF COURT RESPONDENT AMENDS HIS ANSWER BY INTERLINEATION AS FOLLOWS PARAGRAPH 12, line 5; AFTER WORD SECTIONS" INSERT "7602—memo fld., LEAVE GRANTED (HKW)

2/27/78—DEFT EUGE PRESENT WITH COUNSEL, CAUSE PASSED TO 4/10/78 AND GOVERERNMENT IS TO RESPOND TO ANSWER.

4/7/78—MOTION TO COMPEL DISCOVERY & FOR CONTINUANCE TO PERMIT DISCOVERY WITH MEMORANDUM IN SUPPORT—fld., by respondent

4/7/78—MEMORANDUM IN OPPOSITION TO PETITION TO ENFORCE IRS SUMMONS—fld., by respondent

4/10/78—CAUSE HEARD, ARGUED & SUBMITTED

4/13/78—ORDER—fld., it is hereby ordered that the Mtn of Petitioners to Suspend & Limit Discovery & Mtn to Quash Notice to take Depos be granted; it is further ordered that the respondent's Mtn to compel discovery & for Continuance to Permit Discovery be DENIED. It is further ordered that respondent Harvey F. Euge obey the IRS summons dated Oct. 7, 1978 by providing handwriting exemplars. It is further ordered that respondent Harvey F. Euge comply with the terms of this Order within ten days (HKW). cc; to attys

4/21/78—MOTION TO STAY ORDER PENDING APPEAL BOND & WAIVING BOND—fld., DENIED (HKW) cc; to attys.

4/21/78—NOTICE OF APPEAL—fld., by respondent

4/21/78—Certified copy of Notice of Appeal & 2 certified copies of Clerk's Docket entries to USCA

4/24/78—ORDER FROM USCA—fld., for cause shown it is now here ordered that the order entered April 13, 1978, by the U.S. Dist. Court for the Eastern Dist of Mo. enforcing a summons issued on behalf of the IRS be & it is hereby stayed pending further order of this court.

DATE	PROCEEDINGS

4/28/78—APPELLANT'S DESIGNATION OF ORIGINAL RECORD FOR APPELLATE REVIEW—fld.,

5/8/78—ORDER FROM USCA—fld., it is now ordered that the USCA Court's temporary stay ordered April 24, 1978, is dissolved. Appellant's mtn for stay pending appeal is DENIED.

5/22/78—CERTIFIED COPY OF ORDER FROM SUPREME COURT OF THE UNITED STATES—fld., it is ordered that the order entered April 13, 1978 by the U.S. Dist. Court for the Eastern Dist. of Mo. enforcing summons issued on behalf of the IRS be and the same is hereby stayed pending receipt of a response to this application from the Office of the Solicitor General & further order of a Justice of this court or of the full court. cc; to attys

5/26/78—TRANSCRIPT OF ORAL PROCEEDINGS I, II, III VOLS.—fld.,

5/30/78—CERTIFIED COPY OF ORDER FROM USCA—fld., staying the order entered April 13, 1978 by U.S. Dist. Court

6/1/78—CERTIFIED COPY OF ORDER FROM USCA—fld.,

7-13-78—DELIVERED TO USCA—Original document paged and indexed along with Clerk's docket entries, exhibits and transcript

12-19-78—MANDATE OF USCA—fld. judgment of District Court reversed. cause remanded for proceedings consistent with opinion. cc a original pleadings & transscribe re ed.

12-19-78—ORDER—fld in accordance with the Mandate of USCA it is hereby ORDERED that the administrative subpoenas or summons herein, be and is QUASHED. (HKW)

12-21-78—BILL OF COSTS—fld taxed against USA in the amount $454.25

3/27/79—COPY OF NOTICE OF FILING PETITION FOR CERT IN U.S. SUPREME CT.—fld.

[Proceedings in Court of Appeals]

DATE	FILINGS—PROCEEDINGS

1978

Apr. 21 Docketed appeal.

Apr. 21 Cert. copies Notice of Appeal, Docket Entries of D.Ct.

Apr. 21 Motion to Stay Order Pending Appeal and Waiving Bond

Apr. 24 Order: Order entered 4-13-78 to U.S. District Court for E. Dist. of Mo. enforcing summons issued on behalf of IRB is stayed pending further order of the Court. Appellee, U.S.A., directed to file t/w response to motion for stay on or before Friday, April 28, 1978.

Apr. 26 Appearance appellees.

Apr. 28 Aples response to mo for stay.

May 2 Appellant's memo in support of mo to stay order pending appeal.

May 5 Order: Court's temporary stay ordered April 24 dissolved and appellant's motion for stay pending appeal is denied.

May 11 BRIEFING SCHEDULE: Aplnt br due 6/5/78, Aple br due 7/10/78.

May 18 Certified copy of an order of the Supreme Court of the United States in Case No. A-962, signed by Mr. Justice Blackmun on May 16, 1978, granting the stay pending response from Office of Solicitor General and further order of Justice of Supreme Court or of full Court.

May 30 Certified copy of an order of the Supreme Court of the U.S. in Case No. A-962, signed by Mr. Justice Blackmun on May 25, 1978, granting the stay pending the disposition of the appeal.

Jun 5 *Brief Appellant* w/ser. 0+3 (extra copies 8/17/78)

Jul 5 *Brief Appellee* w/ser. 10 copies

DATE	FILINGS—PROCEEDINGS
1978	
July 5	Appearance appellees.
July 13	RECEIVED ORIGINAL AND TWO COPIES DESIGNATED RECORD, ENVELOPE CONTAINING Govt. Exhibit 1 and Deft. Exhibit A, TRANSCRIPT OF Feb. 13, 1978, TRANSCRIPT OF Feb. 27, 1978, AND TRANSCRIPT OF April 10, 1978 (total 3 vol tran)
Jul 17	*Reply brief* w/ser. 0+4 (extra copies 8/17/78)
July 26	Mo appellant for hearing en banc.
Aug. 14	ORDER: Appellant's motion for submission to the Court en banc is granted Clerk is directed to calendar this appeal for oral argument and submission en banc on Wednesday, 10/18/78 in St. Paul, Minnesota.
Aug 31	Appearance appellees.
Sep. 20	Transferred to October session.
Oct. 18	Appearance for appellant
Oct 18	Argued and submitted to the Court en banc. James Erwin for appellant; Daniel Ross, Dept. of Justice for United States. Rebuttal by Erwin.
Oct. 25	Post-argument memorandum of counsel for appellees
Nov. 22	Opinion by Judge Henley. Dissenting opinion by Judge Stephenson
Nov. 22	JUDGMENT: Judgment of Dist. Ct. is reversed & remanded to Dist. Ct. in accordance with majority opinion.
Dec. 6	Appellant's bill of costs.
Dec. 18	Mandate issued.
Dec. 20	Receipt for mandate.

DATE	FILINGS—PROCEEDINGS
1979	
Feb. 12	Letter from clerk of Supreme Court stating extension of time to file petition for writ of certiorari has been granted to & inc. 3/22/79
Mar. 27	Notice of filing petition for writ of certiorari in Supreme Court of United States as Case No. 78-1453, as of 3/19/79.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 78-0004-C

[Filed January 12, 1978]

UNITED STATES OF AMERICA and PATRICK J. FINNESSEY,
Special Agent of the Internal Revenue Service,
PETITIONERS

v.

HARVEY F. EUGE, RESPONDENT

PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS

The United States of America and Patrick J. Finnessey, Special Agent of the Internal Revenue Service, by their attorney, Robert D. Kingsland, United States Attorney for the Eastern District of Missouri, show unto this Court as follows:

I

This is a proceeding brought under the authority of Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954 to judicially enforce an Internal Revenue Service summons.

II

The petitioner, Patrick J. Finnessey, is a Special Agent of the Internal Revenue Service, employed in the Intelligence Division of the Office of the District Director of Internal Revenue in St. Louis, Missouri.

III

Respondent Harvey F. Euge maintains an office at 2900 Washington in the City of St. Louis, State of Missouri, and resides within this judicial district.

IV

Special Agent Patrick J. Finnessey is conducting an investigation for the purpose of ascertaining the correct income tax liability of Harvey F. Euge for the years 1973, 1974, 1975 and 1976 as is set forth in the declaration of Special Agent Patrick J. Finnessey, attached hereto as Exhibit A.

V

On October 7, 1977, an Internal Revenue Service summons, a copy of which is attached hereto as Exhibit B, was issued by the petitioner, Patrick J. Finnessey, directing the respondent, Harvey F. Euge to appear before the said Patrick J. Finnessey on October 18, 1977, at 10:00 A.M., at 1114 Market Street, Room 747, St. Louis, Missouri, and to provide handwriting exemplars. A copy of this summons was personally served on Harvey F. Euge on October 7, 1977, as is set out in the declaration of the petitioner, Patrick J. Finnessey, attached hereto as Exhibit A.

VI

The respondent failed to comply with the summons on October 18, 1977, and his refusal to comply with the summons continues to this date.

VII

The handwriting exemplars necessary to ascertain respondent's income tax liability are not in the petitioner's possession.

VIII

The handwriting exemplars sought by the summons described in Paragraph V, above, are relevant to ascertaining the correct federal tax liabilities of Harvey F. Euge for the years 1973, 1974, 1975 and 1976, and are essential to complete the investigation of said tax liabilities.

IX

The summons as described in paragraph V is not a "third party summons" as that term is used in 26 U.S.C.

§ 7609, requiring that notice of summons be given to any person identified in the description of the records contained in the summons.

WHEREFORE, the petitioners, the United States of America and Patrick J. Finnessey, respectfully pray:

1. That this Court enter an Order directing the respondent, Harvey F. Euge, to show cause, if any he has why he should not comply with and obey the summons attached hereto as Exhibit B in each and every requirement thereof;

2. That this Court enter an Order directing the respondent, Harvey F. Euge, to obey the summons attached hereto as Exhibit B by ordering the respondent to provide handwriting exemplars as required by the terms of the summons, at such time and place as hereafter may be fixed by the petitioner, Patrick J. Finnessey, or any other proper officer of the Internal Revenue Service; and

3. That this Court grant such other and further relief as it deems just and proper.

ROBERT D. KINGSLAND
United States Attorney

WESLEY D. WEDEMEYER
Assistant United States Attorney

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No.

UNITED STATES OF AMERICA and PATRICK J. FINNESSEY,
Special Agent of the Internal Revenue Service,
PETITIONERS

v.

HARVEY F. EUGE, RESPONDENT

DECLARATION OF PATRICK J. FINNESSEY

I, PATRICK J. FINNESSEY, declare that:

1. I am a Special Agent employed in the Intelligence Division of the Office of the District Director of Internal Revenue at St. Louis, Missouri.

2. In my capacity as a Special Agent, I am conducting an investigation for the purpose of ascertaining the correct income tax liability of Harvey F. Euge for the years 1973, 1974, 1975 and 1976.

3. As a part of my investigation, I issued on October 7, 1977, an Internal Revenue Service summons to Harvey F. Euge, directing him to appear before me on October 18, 1977, at Room 747, 1114 Market Street, St. Louis, Missouri, at 10:00 A.M., and to provide such handwriting exemplars as may be necessary to ascertain his correct tax liability. A copy of this summons is attached to these pleadings as Exhibit B. The respondent was further advised that if he had a prearranged appointment for that date, arrangements could be made for him to appear at an earlier date. The respondent advised the declarant that he had no intention of appearing in response to the summons.

4. The respondent Harvey F. Euge failed to appear before the declarant on October 18, 1977, or at any other time. The respondent's refusal continues to the date of this declaration.

5. The declarant does not have in his possession sufficient numbers of handwriting exemplars to ascertain the tax liability of respondent for the years 1973, 1974, 1975 and 1976. The requested exemplars are necessary to determine said tax liability.

I, PATRICK J. FINNESSEY, declare under penalty of perjury that the foregoing is true and correct.

/s/ Patrick J. Finnessey
PATRICK J. FINNESSEY

Form 2039
(Rev. 3-77)

Summons

In the matter of the tax liability of

Harvey F. Euge

Internal Revenue District of St. Louis

Periods 1973, 1974, 1975 and 1976

The Commissioner of Internal Revenue

To Harvey F. Euge

At

You are hereby summoned and required to appear before Patrick J. Finnessey, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the person identified above for the periods shown and to bring with you and produce for examination the following books, records, papers, and other data:

To obtain handwriting exemplars.

Business address and telephone number of Internal Revenue Service officer named above:

Internal Revenue Service, 1114 Market Street, St. Louis, MO 63188 314/425-4012

Place and time for appearance:

at U. S. Courts & Customs House, 1114 Market Street, Room 747, St. Louis, MO

on the 18th day of October, 19 77 at 10 o'clock A M.

Issued under authority of the Internal Revenue Code

this 7th day of October, 19 77.

Signature of Issuing Officer — Special Agent, Title

Signature of Approving Officer (if applicable) — Group Manager, Title

Original to be retained by IRS

Form 2039 (Rev. 3-77)

EXHIBIT B

Certificate of Service of Summons and Notice

(Pursuant to section 7603, Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:

Date	Time
October 7, 1977	2:41 P.M.

How Summons Was Served

☑ I handed an attested copy of the summons to the person to whom it was directed.

☐ I left an attested copy of the summons at the last and usual place of abode of the person to whom it was directed. I left the copy with the following person (if any).

Signature	Title
[signature]	Special Agent

This certificate is made to show compliance with section 7609, Internal Revenue Code. This certificate applies only to summonses served on third-party recordkeepers and not to summonses served on other third parties or any officer or employee of the person to whose liability the summons relates nor to summonses in aid of collection, to determine the identity of a person having a numbered account or similar arrangement, or to determine whether or not records of the business transactions or affairs of an identified person have been made or kept.

I certify that, within 3 days of serving the summons, I gave notice (Form 2039-D) to the person named below on the date and in the manner indicated.

Date of Giving Notice: _____ Time: _____

Name of Noticee: _____

Address of Noticee (if mailed): _____

How Notice Was Given

☐ I gave notice by certified or registered mail to the last known address of the noticee.

☐ I gave notice by handing it to the noticee.

☐ I left the notice at the last and usual place of abode of the noticee. I left the copy with the following person (if any).

☐ In the absence of a last known address of the noticee, I left the notice with the person summoned.

☒ No notice is required.

Signature	Title
[signature]	Special Agent

Form 2039 (Rev. 3-77)

APPENDIX 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 78-MISC-0004-C

[Filed February 6, 1978]

UNITED STATES OF AMERICA and PATRICK J. FINNESSEY,
Special Agent Of The Internal Revenue Service,
PETITIONERS

v.

HARVEY F. EUGE, RESPONDENT

ORDER OF ATTACHMENT FOR ARREST

Whereas, it appears that Harvey F. Euge, on the 13th day of January, 1978, was personally served with an Order to Show Cause to appear before this Court and that the said Harvey F. Euge willfully failed and refused to appear before this Court on February 6, 1978, to show cause why he should not be compelled to obey the Internal Revenue Service summons issued to him on October 7, 1977.

IT IS ORDERED that a Writ of Attachment be forthwith issued, commanding the Marshal of this court and his deputies, to attach the said Harvey F. Euge, and have his body before this Court at 1114 Market Street, St. Louis, Missouri, forthwith, to proceed to a hearing of the above case. A copy of this Order shall be served upon the said Harvey F. Euge at the time he is apprehended.

/s/ H. Kenneth Wangelin
H. KENNETH WANGELIN
United States District Judge

Dated this 6th day of
February, 1978

APPENDIX 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Filed February 8, 1978]

UNITED STATES OF AMERICA and PATRICK J. FINNESSEY,
Special Agent Of The Internal Revenue Service,
PETITIONERS

v.

HARVEY F. EUGE, RESPONDENT

ORDER

Now on this date appeared the United States Attorney and respondent Harvey F. Euge, who was in the custody of agents of the Intelligence Division, Internal Revenue Service, pursuant to this Court's Order of Attachment for Arrest of respondent for failure to appear on February 6, 1978, as required in the Court's Order to Show Cause heretofore entered. Now therefore,

IT IS ORDERED that the Order and return of attachment for arrest are dissolved, and the respondent Harvey F. Euge is released from custody; the Order to Show Cause is continued to February 13, 1978, at 10:00 A.M., at which time the respondent is ordered to appear and make his return, together with counsel appointed for him in this matter.

/s/ H. Kenneth Wangelin
H. KENNETH WANGELIN
United States District Judge

Dated this 8th day of
February, 1978

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 78-0004-C

[Filed February 17, 1978]

UNITED STATES OF AMERICA and PATRICK J. FINNESSEY,
Special Agent of the Internal Revenue Service,
PETITIONERS,

vs.

HARVEY F. EUGE, RESPONDENT

ANSWER TO PETITION TO ENFORCE
INTERNAL REVENUE SUMMONS

Comes now Respondent, Harvey F. Euge, and for his Answer to the Petition to Enforce Internal Revenue Summons states as follows:

1. Respondent admits paragraph 1.
2. Respondent admits paragraph 2.
3. Respondent admits paragraph 3.
4. Respondent is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 4, and accordingly, denies the same.
5. Respondent admits paragraph 5.
6. Respondent admits paragraph 6.
7. Respondent denies paragraph 7.
8. Respondent denies paragraph 8.
9. Respondent admits paragraph 9.

FIRST AFFIRMATIVE DEFENSE

10. The Order to Show Cause is not appropriate or sufficient process in that it fails to specify the location of the Court in which Respondent was ordered to appear with sufficient particularity. As a consequence of this defect in said Order, this Court lacks jurisdiction over the person of Respondent.

SECOND AFFIRMATIVE DEFENSE

11. The Order to Show Cause was served upon Respondent by Patrick J. Finnessey, a named party in this action in violation of the Federal Rules of Civil Procedure and Sections 7402(b) and 7604(a) of the Internal Revenue Code. As a consequence of this defect in the service of said Order, this Court lacks jurisdiction over the person of Respondent.

THIRD AFFIRMATIVE DEFENSE

12. Petitioner lacks statutory authority to compel Respondent to create, produce or execute handwritings [*sic*] exemplars in that said handwriting exemplars, which are not presently in existence, are not "books, records or other data" within the meaning of Sections 7402(b) and 7604(a) of the Internal Revenue Code.

FOURTH AFFIRMATIVE DEFENSE

13. Compelling Respondent to create, produce or execute handwriting exemplars not already in existence without statutory authorization constitutes an unreasonable search and seizure in violation of Respondent's right under the Fourth Amendment to the United States Constitution.

FIFTH AFFIRMATIVE DEFENSE

14. The summons is invalid because it is vague and overbroad in that it fails to state specifically the nature and number of handwriting exemplars which Petitioner seeks to compel Respondent to create, produce or execute.

SIXTH AFFIRMATIVE DEFENSE

15. There exist handwriting exemplars of Respondent which are available to, or are in the possession and/or control of Petitioner. These existing exemplars are sufficient to enable Petitioner to complete the investigation of Respondent.

SEVENTH AFFIRMATIVE DEFENSE

16. Compelling Respondent to create, produce or execute handwriting exemplars when Petitioner has existing handwriting exemplars of Respondent available to it, or within its possession and/or control, constitutes an unnecessary examination of Respondent within the meaning of Section 7605(b) of the Internal Revenue Code.

EIGHTH AFFIRMATIVE DEFENSE

17. Petitioners seek the handwriting exemplars in connection with an investigation which has as its sole purpose, or principal purpose, the gathering of information to be used in a criminal prosecution of Respondent.

NINTH AFFIRMATIVE DEFENSE

18. The summons was not issued in good faith in that Petitioner Patrick J. Finnessey, as a result of his investigation, has formed a firm purpose to recommend criminal prosecution of Respondent.

WHEREFORE, having fully answered, Respondent prays this Court to enter its Order denying enforcement of the summons and discharging Respondent forthwith.

THOMPSON & MITCHELL

By /s/ James W. Erwin
JAMES W. ERWIN
One Mercantile Center,
Suite 3400
St. Louis, Missouri 63101
231-7676
Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was mailed, postage prepaid, this 17th day of February, 1978, to Wesley D. Wedemeyer, Assistant U.S. Attorney, 1114 Market Street, St. Louis, Missouri 63101.

/s/ James W. Erwin

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

78 MISC 4

UNITED STATES OF AMERICA and PATRICK J. FINNESSEY,
Special Agent of the Internal Revenue Service,
PETITIONER,

vs.

HARVEY F. EUGE, RESPONDENT

St. Louis, Missouri
April 10, 1978

TRANSCRIPT OF ORAL PROCEEDINGS

* * * *

[3] PATRICK J. FINNESSEY,

was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. WEDEMEYER:

Q. Would you state your name please?
A. Patrick J. Finnessey.
Q. And what is your occupation, Mr. Fennessey?
A. I'm a Special Agent with the Internal Revenue Service, Intelligence Division.
Q. Intelligence Division?
A. That is correct.
Q. And where are your offices?
A. Here in the Court-Customs House.
Q. Mr. Finnessey, have you been involved in investigation of the tax liability of Mr. Harvey Euge?
A. Yes I have.

Q. And for how long if you can remember?
A. Approximately six months.
Q. You know whether or not Mr. Euge had been subject to investigation prior to the time that the matter came to your attention in Intelligence Division?
A. I'm not sure that I understand the question.
Q. Has Mr. Euge been subject to investigation by some [4] office of the Revenue Service prior to the matter coming to you for investigation?
A. Yes he has. It was referred to us by the Audit Division.
Q. And by any other division?
A. The Collection Division, and prior to that, Office Audit.
Q. What are the duties of the Collection Division?
A. Primarily to collect taxes, assess taxes. I believe they also solicit returns where no returns have been filed.
Q. And what are the duties of the Audit Review?
A. Audit Review?
Q. Yes.
A. Their duties in this particular case, it was referred to them by Collection Division and they review the audit potential of the case and refer it to an active field audit division.
Q. Were you aware why Mr. Euge was being investigated?
A. For failing to file income taxes.
Q. Do you know for taxes or returns or—
A. Returns, income tax returns.
Q. Do you know for how long he had not filed any income tax returns?
A. To my knowledge he's never filed a tax return.
THE COURT: Let me interrupt just a minute on [5] another matter.

(Discussion was had off the record on another matter.)

THE COURT: Go ahead.
Q. (By Mr. Wedemeyer) Was an effort made to determine whether or not Mr. Euge had filed any income tax returns?
A. Yes there was.

Q. And what was the result of that investigation?
A. That no returns could be located for Harvey F. Euge.
Q. How do they make this determination?
A. National search is made of all service centers throughout the country and the National Retention Center at Martinsburg, Virginia.
Q. Was there a revenue agent assigned to this case?
A. Yes there is.
Q. Mr. Finnessey, was an effort made to determine whether or not Mr. Euge has an occupation?
A. Yes there was.
Q. And what were the results of that effort?
A. We determined that his primary source of income is from that of preparing tax returns for others.
Q. And how did you find that out?
A. Well, his stated occupation is listed in the yellow pages of the 'phone directory and we also interviewed some individuals that he had prepared tax returns for.
[6] (Government's Exhibit No. 1 marked for identification.)

Q. Mr. Finnessey, I'm handing you what has been marked Government's Exhibit No. 1. Can you identify that, sir?
A. Yes, this is a photocopy of page 1239 of the yellow pages of the 'phone directory.
Q. And what type of listing is on that particular page?
A. This is a listing for tax return preparation.
Q. Is there a listing for one Harvey F. Euge?
A. Yes there is.
Q. And how does it read?
A. "Euge, Harvey F., get 'em back money tax man, prepared in your home, appointment only. Tax review and rework makes you money. 2900 Washington."
Q. Mr. Finnessey, what was the Collection Division, the Audit Review Division, attempting to determine?
A. Whether or not Mr. Euge had filed tax returns.
THE COURT: For other people or for himself?
THE WITNESS: For himself.

THE COURT: All right.

Q. And for what years?

A. The years that we had under investigation are 1973 through 1976.

THE COURT: Has an extension been filed or submitted?

THE WITNESS: No, there has not.

THE COURT: All right.

[7] Q. (By Mr. Wedemeyer) And what specifically for those years were you attempting to determine?

A. We were attempting to determine his true income tax liability.

Q. Is there a particular method by which you were attempting to reconstruct his tax liability for those years?

A. Yes, we were approaching it through an indirect method of proof know [*sic*] as the Bank Deposits Method.

Q. And what specifically is the Bank Deposit Method, what is that?

A. That's primarily where an examination is made of the bank account totaling the deposits to the account, determining the nature of the deposit to determine whether or not they are of a taxable nature and to subtract non-income items in arriving at a taxable income figure.

Q. Is this one of the accepted methods of determining tax liability?

A. Yes it is.

Q. During your investigation were you able to determine whether there were any bank accounts under the name of Harvey Euge?

A. Investigation disclosed that there were only two bank accounts in the name of Harvey F. Euge.

Q. During your investigation have you become aware that Mr. Euge may have been using other bank accounts under [8] assumed names?

A. Yes we did.

Q. These would be bank accounts under aliases?

A. That's correct.

Q. And how many bank accounts were you able to uncover that may have been actually owned by Harvey Euge?

A. We believe there's a total of twenty accounts.

Q. And how many were you inquiring into specifically?

A. Twenty-two accounts totally.

Q. And how were you able to determine these may have been bank accounts under aliases but used by Harvey Euge?

A. There are a number of items. The frequency of transfers between the accounts, the use of a post office box where the statements were sent was listed to Mr. Euge, and on the signature cards street addresses were of properties owned by Mr. Euge.

Q. And specifically, what was the purpose of your investigation into these bank accounts.

A. To reconstruct Mr. Euge's income tax liability for the years in question.

THE COURT: Can you give the Court any idea as to the total amount in all these accounts, two in his own name and the others that you suspect to be aliases, that were on hand at the time this matter came before the Court, which was the 12th day of January 1978?

[9] THE WITNESS: We haven't completed the bank work. The two years that are best constructed at this point are '75 and '76 and the deposits in those two years are approximately $50,000. and $30,000. respectively.

THE COURT: I don't believe Mr. Euge was under oath at the time, and I'm not suggesting that you're right or wrong, I don't know, but I believe the file will show that Mr. Euge requested the Court to appoint Counsel.

You are appointed, aren't you, sir?

MR. ERWIN: Yes, Your Honor.

THE COURT: You had not been paid in any way, shape, form or fashion?

MR. ERWIN: No I haven't.

THE COURT: All right, go ahead.

Q. (By Mr. Wedemeyer) Mr. Finnessey, as part of your investigation did you issue Mr. Euge an Internal Revenue Summons?

A. Yes I did.

Q. Do you remember on what date?

A. I don't recall the specific date.

Q. Your declaration attached to the petition states October 7th 1977. Would that be accurate?

A. Yes.

Q. Did it give him a specific date to come into your office and to provide you with certain exemplars?

[10] A. Yes it did.

Q. Was that date October 18th 1977?

A. Yes it is.

Q. Did Mr. Euge respond?

A. No, he did not.

Q. Did he come in your office?

A. No, he did not.

Q. Did he contact you in anyway?

A. No, he did not.

Q. Did you serve that IRS Summons initially?

A. Yes I did.

Q. Did he give you any indication whether he would comply?

A. When I served the summons he told me he would not comply.

Q. Is it a fair statement to say that you need these handwriting exemplars to reconstruct his tax liability?

MR. ERWIN: Your Honor, I object. No showing this witness is competent to testify as to what exemplars are needed.

THE COURT: Overruled.

Q. Let me ask you a different question. Do you know specifically what exemplars you need at the present time?

A. We need exemplars to match the signature cards for the accounts so that we can establish whether or not these [11] accounts are in fact—

THE COURT: Are these the accounts—I'm talking about this other estimated twenty accounts that are an alias or assumed names. Was it your testimony as I understood it that the statements on these accounts were all mailed to a post office box which was in the name of Harvey F. Euge?

THE WITNESS: Yes, they're either mailed to the post office box or they were sent to the addresses of property owned by Mr. Euge and then he would pick them up at the post office.

THE COURT: All right, go ahead.

Q. (By Mr. Wedemeyer) Mr. Finnessey, at my request have you prepared a list of the aliases which you require to complete your investigation?

A. Yes I have.

Q. And would you read for the Court please what those aliases are?

A. Robert Welles, Richard L. Sappington, Sam Flanders, Larry R. Anderson, James I. Campbell, John M. Ledbetter, John L. Neals and Frank J. Rollins.

Q. Mr. Finnessey, the Internal Revenue Service has their own handwriting laboratory, is that not correct?

A. Yes we do.

Q. Do they have a specific form which they generally wish handwriting exemplars to be made on?

[12] A. Yes they do.

Q. Do you have copies of that form for Mr. Euge to use in event the Court requires him to provide these exemplars?

A. Yes I do.

Q. And of the aliases you wish to compel him to make, about how many examples of each alias would you require?

A. At least ten examples of each alias, and in addition, we have a four page format which they write a paragraph in script and write the numerals of the—in numerical form and in script.

Q. Mr. Finnessey, did you bring a copy of that with you today?

A. No I didn't.

Q. During your investigation, Mr. Finnessey, did you become aware that another agency of the Federal Government had sought and obtained handwriting exemplars from Mr. Euge during a separate independent investigation?

A. Yes I did.

Q. What agency was that?

A. That's the Postal Inspection Division.

Q. Did you contact anybody in the Postal Inspectors Office?

A. Yes I did.

Q. Who was that?
A. Inspector J. D. Nichols.
[13] Q. Did you have any conversation with Mr. Nichols about these exemplars?
A. Yes I did.
Q. Did he tell you that he had some exemplars from Mr. Euge, one of your aliases?
A. Yes he did.
Q. And which alias was that?
A. James I. Campbell.
Q. Did you ask him whether he had any exemplars of the other aliases that you were looking at?
A. Yes I did.
Q. What did he say?
A. He said he did not.
Q. Mr. Finnessey, have I shown you during our discussions on this matter the exemplars, various other handwriting exhibits that Mr. Finnessey—excuse me, that Mr. Euge gave to Mr. Nichols?
A. Yes, you did.
Q. With exception of James Irwin Campbell, are any of those exemplars that you received from Mr. Nichols the ones that you're looking after?
A. No.
Q. Do you have in your possession or do you have access to any exemplars of the aliases of Mr. Euge that you suspect are Mr. Euge's aliases in your possession or that you could [14] obtain?
A. We could obtain them, yes.
THE COURT: Sir?
THE WITNESS: We could obtain them.
Q. By what means?
A. Through the summons procedure.
Q. The procedure here?
A. Yes.
Q. You have any other way of getting them?
A. No.
Q. Are exemplars of these aliases necessary for your investigation?
A. Yes they are.

MR. ERWIN: Your Honor, object. Witness is not competent to testify as to what exemplars are necessary for analysis.
THE COURT: Overruled. Proceed.
Q. Are the exemplars which you're requesting in your petition necessary for you to complete your investigation of the tax liability for Mr. Euge for 1973, '74, '75 and '76?
A. Yes they are.
Q. Are you familiar with what is required by your handwriting laboratory within the service for exemplars for good comparison?
A. Yes I am.
[15] THE COURT: What you're asking for by way of exemplars is basically the signatures, is that right, sir?
THE WITNESS: That's correct.
THE COURT: All right.
Q. Mr. Finnessey, is there a criminal prosecution pending against Mr. Euge at the present time?
A. Not to my knowledge.
Q. Mr. Finnessey, have you made any recommendations for a criminal prosecution internally within the Internal Revenue Service?
A. No, I have not.
Q. And why have you not made your recommendation of this kind?
A. We haven't been able to determine Mr. Euge's correct tax liability at this point.
Q. Are there possible criminal aspects in an investigation of this kind?
A. There is always that possibility, yes.
Q. Would you know what kind of criminal violations could have occurred here?
A. Well, the one that seems most obvious would be the failure to file income tax returns.
Q. Are you able to determine that in any way?
A. Not at this point. We don't know if he was required to file.
[16] MR. WEDEMEYER: That's all the questions I have, Your Honor.

CROSS EXAMINATION

BY MR. ERWIN:

Q. Mr. Finnessey, isn't it true that a case doesn't get to your office unless there's possibility of a criminal violation?

A. Yes, I would say that's true.

Q. And you pursue the case until the possibility of the criminal violation is either confirmed or it's decided not to recommend prosecution, isn't that right?

A. That's correct.

Q. And you have not yet made a recommendation either way?

A. No, I have not.

Q. So you have not yet found out that there may not be a criminal prosecution of Mr. Euge?

A. I don't know one way or the other at this point in time.

Q. It's still an open possibility?

A. That is correct.

Q. Are you aware of any other facts besides his failure to file an income tax return to indicate that he may have committed a crime, tax crime?

A. No, not to my knowledge.

[17] Q. As part of your training, part of your job is to develop evidence for criminal prosecution, is it not?

A. That's correct.

Q. And the failure to file is a crime under the tax laws of the United States, isn't that true?

A. That is correct.

Q. And it can be either a misdemeanor or felony, isn't that right?

A. It can be, yes.

Q. And one of the differences as to whether it's a misdemeanor or a felony is whether there's evidence of willfulness, is that not true?

A. No, willfulness has to be present in both.

Q. But if there is significant evidence of willfulness of an intent to evade or an intent to deliberately not to file, would that be strong evidence of a criminal violation?

A. If there are distinct overt acts involved, yes, that's a possibility.

Q. And if there are distinct overt acts then the case may be considered a felony rather than a misdemeanor, is that not true?

A. That is a possibility.

Q. Wouldn't you say that one factor in considering whether there are distinct overt acts is the experience or the occupation of the taxpayer?

[18] A. That could be taken into consideration, yes.

Q. Well, the fact that he—or you believe he is a tax return preparer, would that not be an indication of one of the overt acts necessary for a criminal violation, a felony?

A. Well, that's an indication that he should have knowledge of tax law.

Q. But it is one factor considered?

A. Yes it is.

Q. And is not another factor to be considered the concealment of assets?

A. It can be, yes.

THE COURT: Well, let me ask this question at this point, both of you gentlemen. Now, there is not presently pending any Federal prosecution against Mr. Euge. In other words, there's been no Information or Indictment filed, is that correct, Mr. Wedemeyer?

MR. WEDEMEYER: None whatsoever.

THE COURT: Assuming that there had been, can either of you gentlemen cite me any law which would prevent the Government from securing handwriting exemplars from this defendant?

MR. WEDEMEYER: If there was a pending prosecution by way of an indictment or information returned, Your Honor, I don't believe this would be appropriate procedure to get those exemplars.

[19] THE COURT: I understand that, but if there was and the Government filed a motion in this Court by way of discovery to get his handwriting exemplars, is there any law to the effect that he would not be required to give handwriting exemplars?

MR. WEDEMEYER: Your Honor, I don't know the specific answer to that, I don't have criminal—

THE COURT: Well, all I can say is, there may be arguable situations depending on the facts, and this doesn't involve this case, this is a civil matter, but this Court has ordered handwriting exemplars repeatedly and often in felony prosecutions under the statutes of the United States.

MR. WEDEMEYER: Yes, there are recent Supreme Court decisions directly on point with that.

MR. ERWIN: Your Honor, do we not quarrel with that, but I think both parties have filed briefs on the issues whether these exemplars may be obtained under the particular statute involved. This is strictly a legal question as far as I know and not really a factual question.

THE COURT: All right, go ahead with your cross examination.

Q. (By Mr. Erwin) Has your investigation disclosed any facts since you have begun it that indicate that—that tend to exonerate Mr. Euge?

A. No, I don't think so.

[20] Q. In fact, hasn't your investigation so far all tended to incriminate him?

A. That's difficult to answer because we haven't reached the point where we've determined what his tax liability is.

Q. Isn't it true you have to determine his tax liability for a criminal case as well as for a civil case?

A. That is correct.

Q. So that's just as consistent with a criminal prosecution as with a civil?

A. I don't follow the question.

Q. The determination of tax liability is just as consistent with a criminal prosecution as with a civil case?

A. That's correct.

THE COURT: Let me ask this question: Mr. Finnessey, prior to this day have you or any other agent of the Internal Revenue Service to your knowledge ever informed Mr. Euge or his Counsel that he might be the subject of criminal prosecution prior to today?

THE WITNESS: I think at the outset of the investigation Mr. Euge was advised of the nature of the investigation.

(Discussion off the record.)

Q. (By Mr. Erwin) Since October 18th 1977 have you continued to subpoena bank records that you believe to be those of Harvey Euge?

A. I believe we have, yes.

[21] Q. And how many subpoenas have you issued since then?

A. I'm not certain we've issued any since then. I think that possibly we issued them prior to that and they are still outstanding.

Q. Do you recall if you issued a subpoena on October 30th to Pulaski Savings and Loan?

MR. WEDEMEYER: Your Honor, I'm going to object to this line of question. Further, the specific—

THE COURT: Sustained.

Counsel, this may subsequently in this matter or in whatever the Government might file—and I'm not suggesting that they file any criminal prosecution or that they don't, that doesn't come under the purview of this Courts problems, but that sort of information, if available at all, would be under a bill of particulars and would concern itself with what the Government might use in the event of prosecution as I understand the law. You may proceed.

(Defendant's Exhibit A marked for identification.)

THE COURT: Let the record show that Defendant's Exhibit A is a composite consisting of several sheets of paper.

Q. (By Mr. Erwin) Mr. Finnessey, I'll show you Defendant's Exhibit A and ask if you recognize that?

A. Yes I do.

Q. What is it?

[22] A. It's a handwriting exemplar taken by the U.S. Postal Service.

Q. And are these the handwriting exemplars you testified about earlier from the U.S. Postal Service?

A. Yes they are.

Q. And is that all the pages you were shown?
A. Yes, I believe these are all the pages.
Q. And to your knowledge that's all the pages that exists [*sic*]?
A. Yes, sir.
Q. I believe you testified earlier that the IRS has a form that they use for handwriting exemplars?
A. Yes they do.
Q. It contains certain standard information that the person is required to copy?
A. That's correct.
Q. And is that information significantly different from what appears in Defendant's Exhibit A?
A. Not significantly different, no.
Q. And, therefore, if you have this information you will not need a copy of the standard information on the IRS forms?
A. Some ow our standard information will incorporate the identified aliases that we have, that we wish to compare it to signature cards.
[23] Q. Mr. Finnessey, what I'm specifically referring to are these names contained on one of the pages, two of the pages, names that are not aliases, names that are not Harvey F. Euge, but names that appear to be there for the purpose of eliciting handwriting samples of various letters and words.
A. We don't use these particular names as far as signatures are concerned. We want exemplars of the actual aliases so they can be compared name for name.
Q. You testified that there were four pages of standard information that you wanted on the exemplars in the IRS form. Wouldn't it be similar information to this.
A. Our's [*sic*] primarily goes into things other than signatures, because the signatures are taken on individual cards so that they can't be written in a list such as this.
Q. I understand that you're looking for the individual names of the aliases, but aren't you not also looking for information that's contained similar to that standard information?
A. Some of it, yes.

Q. In order to detect disguised handwriting and so forth?
A. Some of it, yes.
Q. Do you wish to have any exemplars of addresses from Mr. Euge under your summons?
A. I'm not exactly sure if there is any on the form or not.
Q. Is an address and numbers contained in the address [24] part of the questioned documents that you're seeking to compare his exemplars with?
A. We're primarily interested in the signatures themselves.
Q. So it's your testimony you do not want the addresses?
A. No, that's not correct.
Q. Is it your testimony you do want the addresses?
A. Yes, we would like to have them in addition too.
Q. What addresses do you want?
A. I don't recall the specific addresses. There's several involved.
Q. If you have the exemplars, Defendant's Exhibit A contain some of the same addresses, then you will not need further addresses?
A. I think you have two of the addresses there.
Q. Which ones are those?
A. Isn't there one on Lemay Ferry and one on California?
Q. Yes, would you like to look at this and see if there's further information that you will need?
A. There are several additional addresses involved.
Q. Besides the ones in Defendant's Exhibits A?
A. That's correct.
Q. And you do want those addresses as well as the aliases that you've listed earlier?
A. If they're incorporated on our standard form. If there's space available for them. Otherwise we're going to [25] primarily delve into the signature themselves on separate cards.
Q. Do you need the signature of James I. Campbell or James Irwin Campbell?

A. We would like to get it, yes, so that we have it in the same format to present to our lab.

Q. You are not going to make this examination yourself, are you?

A. No, I'm not.

Q. It's going to a lab?

A. That's correct.

Q. Where is the location of that lab?

A. In Chicago.

Q. Have you received training in handwriting analysis as part of your training as Special Agent for the IRS?

A. No, I have not.

Q. So you have no personal knowledge of what is needed in order to make a handwriting analysis?

A. I do have the knowledge of what is required for the lab to make a good analysis.

Q. Is this knowledge of your own or what you've been told by other people in the lab or through instructions?

A. What we've been told by the people from the lab.

Q. But you yourself do not know?

A. No.

[26] So you don't know whether you need exactly the—whether it's possible, possible, to make a handwriting analysis of any validity with the exemplars available in Defendant's Exhibit A?

A. I have been told that the validity increases in establishing authorship of a questionable document if you have like or similar writing.

Q. You have been told that, but you do not know yourself?

A. Not as a fact, no, I don't examine documents.

Q. But if Mr. Euge were unavailable for some reason, incapacitated or something like that, have you been told whether the analysis could nevertheless be made on the basis of the exemplars in Defendant's Exhibit A?

A. I can assume that it's possible.

Q. But it would be more convenient for the Government or the IRS to have it's [*sic*] own exemplars?

A. I don't know that that's exactly true, more convenient. I've been told in order to render a valid comparison that it's necessary to have like handwriting exemplars to compare them to.

Q. And the comparison will be invalid if you do not have exactly the same exemplars?

A. It's my understanding the [*sic*] make different degrees of analysis. When they make the analysis they come back with different degrees of comparison and the validity goes [27] on a percentage rate and, obviously, the better exemplars that you have, the more valid comparison that you can obtain.

Q. But this is what you've been told, you don't know this?

A. That's true.

Q. Is an examination ever made of the exemplars or of the documents that are questioned using the exemplars in Defendant's Exhibit A?

A. Not to my knowledge.

MR. ERWIN: I have no further questions, Your Honor.

REDIRECT EXAMINATION

BY MR. WEDEMEYER:

Q. Just wanted to clarify one point, Mr. Finnessey, as to what you need. You testified you needed ten samples of each alias, is that correct?

A. That's correct.

Q. And that in addition to that you have a standard handwriting exemplar format that the laboratory uses and you need that completed in full, is that correct?

A. That's correct.

Q. You stated in the cross examination, failure to file would be a criminal violation. Is that always necessarily true?

A. No, not always necessarily true.

Q. You know whether or not Mr. Euge has any tax liability [28] at all?

A. I do not.

Q. You know whether he has any taxable income at all?

A. Yes, I think we've established that he had some taxable income.

Q. But is that through the possible alias bank accounts or through the bank accounts that you already know of?

A. No, that's actually established from interviewing people that he has prepared tax returns for.

MR. WEDEMEYER: That's all I have.

(Discussion off the record.)

THE COURT: You may be excused. The matter will be taken under submission, gentlemen.

MR. WEDEMEYER: Your Honor, may I withdraw Defendant's Exhibit A, it's not my—

THE COURT: Will you make copies available for respondent?

MR. WEDEMEYER: Yes, this is part of the Postal Inspector's report and it may be some Privacy Act provisions—won't go too much further then [*sic*] it's gone.

[29] CERTIFICATE

I, Richard L. Saunders, do hereby certify that I am a duly appointed Official Court Reporter for the United States District Court within and for the Eastern Division of the Eastern District of Missouri; that I was personally present on April 10, 1978, and made a stenotype record of the testimony adduced and proceedings had in No. 78 MISC (4) Pending in said Court and that pages 1 through 28 contain a complete and accurate transcript of my original stenotype notes.

RICHARD L. SAUNDERS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 78-Misc-0004C(2)

[Filed April 21, 1978]

UNITED STATES OF AMERICA and PATRICK J. FINNESSEY,
Special Agent for Internal Revenue Service,
PETITIONERS,

vs.

HARVEY F. EUGE, RESPONDENT

NOTICE OF APPEAL

Notice is hereby given that Harvey F. Euge, Respondent above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from an order enforcing a summons issued by Petitioners to compel Respondent to give handwriting exemplars, entered in this action on the 13th day of April, 1978.

Dated April 21, 1978

THOMPSON & MITCHELL

By /s/ James W. Erwin
JAMES W. ERWIN
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Attorneys for Respondent

SUPREME COURT OF THE UNITED STATES

No. 78-1453

UNITED STATES, ET AL., PETITIONERS

v.

HARVEY F. EUGE

ORDER ALLOWING CERTIORARI. Filed May 14, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 294704 1

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1453

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

HARVEY F. EUGE, RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION

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Section 7602	4,5,6,7,8,3a
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Internal Revenue Code of 1939:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1453

UNITED STATES OF AMERICA, ET AL., PETITIONERS

V.

HARVEY F. EUGE, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR

THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Harvey F. Euge requests this Court to deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The order of the district court is not reported (App. A to Petition, pp. 1a-3a). Additional orders of the district court on February 6, 1978 and February 8, 1978 are contained in App. 1 and App. 2, infra, pp. 1a-2a. The opinion of the court of appeals is reported at 587 F.2d 25 (App. B to Petition, pp. 4a-9a).

ADDITIONAL STATUTES INVOLVED

The pertinent provisions of Sections 7402, 7602 and 7604 of the Internal Revenue Code of 1954, and Sections 3614, 3615 and 3633 of the Internal Revenue Code of 1939 are set forth in Appendix 3, infra, pp. 3a-5a.

STATEMENT OF THE CASE

In addition to the statement contained in the Petition, respondent believes the following additional facts are relevant. After being served with the Order to Show Cause, respondent failed to appear for the hearing initially set for February 6, 1978. The District Court entered an Order of Attachment for Arrest on February 6, 1978 App. 1, infra, p. 1a. Respondent was taken into custody on February 8, 1978, and brought before the Court. At respondent's request, counsel was appointed to represent him in this matter. Respondent was subsequently released and ordered to appear with counsel at the hearing on the Order to Show Cause App. 2, infra, p. 2a.

On April 13, 1978, the district court ordered respondent to execute handwriting exemplars in compliance with an Internal Revenue Service administrative summons. The court of appeals reversed. In its opinion, the court noted that the "question of whether §7602 authorizes the IRS to require a taxpayer to create a document by giving handwriting exemplars as contrasted to the question of whether the Service can compel the taxpayer to produce for examination an existing piece of writing or document has not been free from doubt...." (App. B to Petition, p. 8a) (emphasis supplied). The majority went on to note that the Sixth Circuit, in United States v. Brown, 536 F. 2d 117 (6th Cir. 1976), and the Second Circuit, in United States v. Davey 543 F.2d 996 (2d Cir. 1976), have both concluded that Section 7602 does not authorize the production of documents not yet in existence.

The majority below stated that the view expressed in the dissenting opinion in United States v. Campbell, 524 F.2d 604 (8th Cir. 1975) should be followed. Contrary to the assertion in the Petition, at pp. 5 and 10, the dissenting opinion in Campbell rests upon statutory construction, rather than upon a view that the compulsion of handwriting exemplars violates the "search and seizure" clause of the Fourth Amendment. This is made clear by the statement that "If the Internal Revenue Service desires the right to require individual taxpayers to give handwriting exemplars, they should go to Congress and ask for this authority." 524 F.2d at 609 (dissenting opinion).

Likewise, the majority in this case in the Eighth Circuit clearly based its opinion upon an interpretation of the statute, rather than upon constitutional grounds. As stated in footnote 3 to the opinion, "Our holding is limited to the precise question before us, namely, whether or not the IRS has the authority under the statute here involved to compel a taxpayer to create out of thin air handwriting exemplars by using his brain, eyes and hand." (App. B to Petition, p. 9a) (emphasis supplied).

REASONS FOR DENYING THE PETITION

The decision of the court of appeals conflicts with that of the Fourth Circuit in United States v. Rosinsky, 547 F.2d 249 (4th Cir. 1977). However, the Rosinsky opinion is unsupported by the text or history of Section 7602 and conflicts with prior decisions of this Court. The court below fully considered and correctly decided the issue of statorory interpretation presented here.

1. The court of appeals' ruling that the Internal Revenue Service does not have the power to compel a person to create documents not yet in existence, including handwriting exemplars, is rooted in the statutory text, the legislative history of the Internal Revenue Code of 1954 and the historical development of the summons power.

In this Court's most recent opinion on the subject of Internal Revenue summonses, United States v. LaSalle National Bank, 437 U.S. 298 (1978), it was noted that "Section 7602 derives, assertedly without change in meaning, from corresponding and similar provisions in §§3614, 3615 and 3654 of the 1939 Code." Id. at 310.[1] In fact, the legislative history of Section 7602 explicitly states that the statute "contains no material change from prior law." H. R. Rep. No. 1337, 83d Cong. 2d Sess., A436 (1954); S. Rep. No. 1622, 83d Cong. 2d Sess., 617 (1954). The predecessors to Section 7602 conferred upon the Internal Revenue Service the power to compel the production of "books, papers, records, or memoranda." Sections 3614 and 3615, Internal Revenue Code of 1939 (App. 3, infra, pp. 4a-5a). These provisions clearly contemplate the production of items which already existed in a tangible form at the time the summons was issued. See, United States v. Campbell, supra at 606.

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[1]The "assertion" was made by the government in LaSalle. See Petitioner's Brief on the Merits, pp. 20 -29, where the government, after an exhaustive review of the history of the summons power, concluded that Section 7602 remained unchanged in meaning from preceding statutes. The Court relied heavily upon the historical antecedents of Section 7602 in concluding that Congress intended to permit administrative investigations of tax fraud with interrelated criminal and civil elements. Id. at 310-311 & nn. 13-14.

Furthermore, Section 3633 of the 1939 Code conferred jurisdiction upon the district court to enforce a summons for "books, papers, or other data." This section was brought forward into the 1954 Code unchanged as Section 7402 (b). (App. 3, infra, p. 3a) The key phrase, "other data", whose meaning was much disputed in this case, as well as in Campbell and Brown, thus is found in the law as it existed prior to 1954. Since the scope of the district court's jurisdiction to enforce a summons could not exceed the Commissioner's power to issue it, clearly the phrase "other data" as it was used in the 1939 Code referred only to tangible, existing items. The legislative history of Section 7602, which makes a direct reference to prior law, indicates that this same interpretation was to be carried forward in the new statute. Thus, Congress was not without a point of reference in stating that Section 7602 worked no "material" change in prior law.

By its decision below, the Eighth Circuit has joined the Second and Sixth Circuits in holding that an Internal Revenue administrative summons cannot be used to compel the creation of documents, including handwriting exemplars. United States v. Davey, supra at 1000; United States v. Brown, supra, at 121, 123.

2. In United States v. Rosinsky, 547 F.2d 249 (4th Cir. 1977), the court of appeals held that the power to compel a person to "appear" carries with it the inherent power to compel the doing of certain non-testimonial acts, such as executing handwriting exemplars.[2] However, this reading of

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[2]In dictum, the Fourth Circuit indicated its agreement with the majority's interpretation of the phrase "other data" in Campbell. United States v. Rosinsky, 547 F.2d at 253 n.3. However, it preferred to rest its decision upon a construction of the word "appear". The Eighth Circuit rejected both arguments in the opinion below.

the statute appears to conflict with the Court's opinion in Reisman v. Caplin, 375 U. S. 440 (1964). In Reisman this Court ruled that the body attachment procedures contained in Section 7604 (b) applied only to the situation where the person summoned "wholly made default or contumaciously refused to comply." Id. at 448. Mere appearance before the proper officer satisfies the statutory requirements placed upon a person served with a summons. Thus, the "appearance" language of the statute is confined to just that -- the person must appear and either comply with the summons or interpose good faith defenses to it. Id. at 446-447. He cannot simply ignore the summons or he risks being taken into custody in order to compel a response.

A similar procedure is in fact what was followed in this case. Respondent failed to appear before the district court in response to the Order to Show Cause served upon him. Order of Attachment for Arrest (App. 1, infra, p. 1a). He was taken into custody and subsequently released after counsel was appointed to represent him and a date set for a hearing. Order (App. 2, infra, p. 2a).

The expansive interpretation of Section 7602 set forth in Rosinsky and urged by petitioners in the lower courts is unsupported by the legislative history of the statute. For example, in United States v. Brown , supra at 120, the government argued that "other data" included "any constitutionally permissible information". In its brief filed in the Eighth Circuit in this case, the government claimed that it could use the summons power not only to obtain handwriting and voice exemplars, but also to use other procedures common to criminal cases as fingerprinting, standing in a lineup, or

trying on clothes for the purpose of identification. Obviously, such a use of the summons power conferred by Section 7602 goes far beyond anything contemplated by the 1939 Code, and is a "material" change from prior law.

3. The decision below rested upon the question whether the Internal Revenue Service had the statutory authority to compel the creation of documents which did not previously exist (App. B to Petition, p. 9a, note 3). The Eighth Circuit correctly held that Congress did not grant this power to the Internal Revenue Service. If the power to compel the creation of documents is truly essential to tax investigations, it should be specifically granted by Congress with appropriate restrictions.

CONCLUSION

For the foregoing reasons, Respondent requests this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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April, 1979

APPENDIX 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION
No. 78-MISC-0004-C

UNITED STATES OF AMERICA and PATRICK J. FINNESSEY,
Special Agent Of The Internal Revenue Service, PETITIONERS
v.
HARVEY F. EUGE, RESPONDENT

ORDER OF ATTACHMENT FOR ARREST

Whereas, it appears that Harvey F. Euge, on the 13th day of January, 1978, was personally served with an Order to Show Cause to appear before this Court and that the said Harvey F. Euge willfully failed and refused to appear before this Court on February 6, 1978, to show cause why he should not be compelled to obey the Internal Revenue Service summons issued to him on October 7, 1977.

IT IS ORDERED that a Writ of Attachment be forthwith issued, commanding the Marshal of this court and his deputies, to attach the said Harvey F. Euge, and have his body before this Court at 1114 Market Street, St. Louis, Missouri, forthwith, to proceed to a hearing of the above case. A copy of this Order shall be served upon the said Harvey F. Euge at the time he is apprehended.

/s/ H. Kenneth Wangelin
H. KENNETH WANGELIN
United States District Judge

Dated this 6th day of
February, 1978

APPENDIX 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION
UNITED STATES OF AMERICA and PATRICK J. FINNESSEY,
Special Agent Of The Internal Revenue Service, PETITIONERS
v.
HARVEY F. EUGE, RESPONDENT

O R D E R

Now on this date appeared the United States Attorney and respondent Harvey F. Euge, who was in the custody of agents of the Intelligence Division, Internal Revenue Service, pursuant to this Court's Order of Attachment for Arrest of respondent for failure to appear on February 6, 1978, as required in the Court's Order to Show Cause heretofore entered. Now therefore,

IT IS ORDERED that the Order and return of attachment for arrest are dissolved, and the respondent Harvey F. Euge is released from custody; the Order to Show Cause is continued to February 13, 1978, at 10:00 A.M., at which time the respondent is ordered to appear and make his return, together with counsel appointed for him in this matter.

/s/ H. Kenneth Wangelin
H. KENNETH WANGELIN
United States District Judge

Dated this 8th day of
February, 1978

APPENDIX 3

Internal Revenue Code of 1954, Title 26, United States Code:

§7402. JURISDICTION OF DISTRICT COURTS

(b) To enforce summons. If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

§7602. EXAMINATION OF BOOKS AND WITNESSES

For the purpose of ascertaining the correctness of any return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized--

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

§7604. ENFORCEMENT OF SUMMONS

(a) Jurisdiction of district court--If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records or other data.

(b) Enforcement--Whenever any person summoned under section * * * 7602 neglects or refuses to obey such summons, or to produce books, papers, records or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

Internal Revenue Code of 1939:

§3614. EXAMINATION OF BOOKS AND WITNESSES

(a) To determine liability of the taxpayer. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

(b) To determine liability of transferee. The Commissioner, for the purpose of determining the liability at law or in equity of a transferee of the property of any person with respect to any Federal taxes imposed upon such person, is hereby authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon such liability, and may require the attendance of the transferor or transferee, or of any officer or employee of such person, having knowledge in the premises, and may take his testimony with reference to the matter, with power to administer oaths to such person or persons.

§3615. SUMMONS FROM COLLECTOR TO PRODUCE BOOKS AND GIVE TESTIMONY

(a) General authority. It shall be lawful for the collector, subject to the provisions of this section to summon any person to appear before him and produce books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof. The collector may summon any person residing or found within the State or Territory in which his district lies; and when the person intended to be summoned does not reside and can not be found within such State or Territory he may enter any collection district where such person may be found and there make the examination herein authorized.

And to this end he may there exercise all the authority which he might lawfully exercise in the district for which he was commissioned.

* * *

(e) Enforcement. Whenever any person summoned under this section neglects or refuses to obey such summons, or give testimony, or to answer interrogatories as required, the collector may apply to the judge of the district court or to a United States Commissioner for the district within which the person so summoned resides for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

3633. JURISDICTION OF DISTRICT COURTS

(a) To enforce summons. If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

Supreme Court, U. S.
FILED
AUG 2 1979
MICHAEL RODAK, JR., CLERK

No. 78-1453

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

HARVEY F. EUGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1453

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

HARVEY F. EUGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The order of the district court (Pet. App. A 1a-3a) is not reported. The opinion of the court of appeals (Pet. App. B 4a-9a) is reported at 587 F.2d 25.

JURISDICTION

The judgment of the court of appeals (Pet. App. C 10a-11a) was entered on November 22, 1978. On

February 8, 1979, Mr. Justice Blackmun entered an order extending the time within which to file a petition for a writ of certiorari to and including March 22, 1979. The petition for a writ of certiorari was filed on March 19, 1979, and was granted on May 14, 1979 (A. 7, 40). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Internal Revenue Service has statutory authority to issue a summons requiring a person to appear and execute handwriting exemplars in aid of an administrative investigation to determine his correct tax liability.

STATUTES INVOLVED

The pertinent provisions of Sections 7601, 7602 and 7604 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in the Appendix, *infra*, 1a-2a.

STATEMENT

1. In October 1977, Special Agent Patrick J. Finnessey of the Intelligence Division of the Internal Revenue Service was assigned, together with a revenue agent, to investigate respondent's income tax liabilities for 1973-1976. The case had been referred to him by the Audit and Collection Division of the Internal Revenue Service after a search revealed that respondent had neither filed nor sought any extension to file a tax return for any of the years in question (A. 22-23). The Service had initially determined that respondent's primary source of income was from fees for preparing tax returns (A. 23). In connection with this activity, respondent had placed an advertisement in the classified telephone directory which read: "Euge, Harvey, F., get 'em back money tax man, prepared in your home, appointment only. Tax review and rework makes you money" (A. 23).

In order to determine respondent's correct tax liability for the years under examination, the agents sought to employ the bank deposits method of reconstructing his income. Under this well-established method of indirect proof, the Internal Revenue Service scrutinizes bank deposits to determine whether they represent taxable income and subtracts any non-income items. The agent's investigation disclosed that there were only two bank accounts in respondent's name. However, during his investigation, Special Agent Finnessey became aware that statements of 20 other bank accounts were sent to post office boxes in respondent's name, that the signature cards of these accounts listed addresses of properties owned by respondent, and that there were frequent transfers of funds between these accounts. These facts suggested to the agent that respondent maintained other bank accounts under aliases in order to conceal his taxable income (A. 24-25). For 1975 and 1976, the deposits in these other bank accounts were approximately $50,000 and $30,000, respectively (A. 25).

As a result of these disclosures, Agent Finnessey issued a summons to respondent on October 7, 1977,

requiring him to appear and complete a standard Internal Revenue Service handwriting exemplar form and to execute exemplars of the various signatures on the bank signature cards. After receipt of this data, the Internal Revenue Service handwriting laboratory would be able to determine whether respondent had maintained bank accounts under assumed names (A. 26-27).[1] At the time Agent Finnessey served the summons, respondent told him that he would not comply with it (A. 11, 25-26; Pet. App. B 7a).

2. When respondent refused to appear in response to the summons, the United States and Agent Finnessey commenced this action under 26 U.S.C. 7604 (a) in the United States District Court for the Eastern District of Missouri to enforce the summons (Pet. App. B 7a-8a).[2] At an evidentiary hearing held by the district court, Agent Finnessey testified with respect to the purpose of the investigation, the relevancy to that inquiry of the information sought by

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[1] Agent Finnessey had ascertained that during a separate independent investigation, respondent had given the Postal Service Inspection Division a handwriting exemplar of one of his suggested aliases (A. 27-28).

[2] On January 13, 1978, respondent was personally served with an order to appear before the district court on February 6, 1978, to show cause why he should not be compelled to obey the summons. After respondent failed to appear before the district court, that court on February 6, 1978, issued an order of attachment for his arrest. On February 8, 1978, after respondent appeared before the court in the custody of Internal Revenue Service agents, the district court dissolved its order of attachment for arrest (A. 15-16).

the summons, and the administrative procedures taken by him to obtain voluntary compliance (Pet. App. A 1a-2a). The agent stated that "[w]e need [the handwriting] exemplars to match the signature cards for the accounts" (A. 26) so that the Internal Revenue Service could establish whether respondent was maintaining bank accounts under assumed names. At the request of the attorney for the government, the agent prepared a list of aliases for which he required handwriting exemplars in order to complete his investigation (A. 27). The agent further explained that exemplars of respondent's aliases were necessary for his investigation and that he had no means of obtaining them other than the summons procedure (A. 28-29). Finally, the agent testified that he had made no recommendation with respect to the possibility of criminal prosecution of respondent (A. 29).

The district court ordered the summons enforced. Specifically, it ordered respondent to complete the Treasury Department Handwriting Exemplars form to be submitted by Ageny Finnessey, and to provide 10 handwriting exemplars of eight different signatures (Pet. App. A 2a).

The court of appeals reversed (Pet. App. B 4a-9a). By a 7-1 en banc vote, it overruled its prior (divided) panel decision in *United States* v. *Campbell*, 524 F.2d 604 (8th Cir. 1975), which had analogized the power of the Service to compel the production of handwriting exemplars to the corresponding power of a federal grand jury. Since grand juries are em-

powered to compel witnesses to give handwriting exemplars, *Campbell* had held that "[t]he Commissioner's statutory authority to summon 'other data' under Title 26 U.S.C., § 7602(2), includes the authority to require the taxpayer to give exemplars of her handwriting" (*id.* at 607).

The en banc decision below reconsidered the question previously resolved in favor of the government in *Campbell*—whether Section 7602 authorizes the Internal Revenue Service to require a taxpayer to execute handwriting exemplars. After reviewing the conflicting authorities (Pet. App. B 8a-9a), the en banc court of appeals concluded that "the view expressed in the dissenting opinion in *Campbell* is the preferable one and should be followed in this case and in the future unless the Supreme Court holds otherwise or unless Congress changes the law" (footnote omitted). The view of the dissent in *Campbell*, adopted by the court, was that the compelled execution of a handwriting exemplar is a search and seizure within the meaning of the Fourth Amendment and that "[t]hose charged with investigative and prosecutorial duties should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks" (524 F.2d at 609).

The dissenting judge in the instant case would have enforced the summons "for all of the reasons expressed in [the majority opinion in] *United States* v. *Campbell*, [*supra*]." (Pet. App. B 9a). That decision held that Sections 7601 and 7602 of the Code gave the Internal Rvenue Service a broad mandate to

investigate and audit persons who may be liable for taxes, and that production of handwriting exemplars was within the Service's statutory summons power. The *Campbell* decision observed that summoned parties had substantial protections against abuse because Congress provided that an internal revenue summons can be enforced only by the courts after an adversary proceeding (see 524 F.2d at 607-608).

SUMMARY OF ARGUMENT

A.

Two provisions of the Internal Revenue Code of 1954, both of which have their origin in the Revised Statutes, support and supplement the accurate and conscientious self-reporting upon which our tax collection system depends. Congress has, in Section 7601 of the Code, directed the Secretary of the Treasury or his delegate "to proceed * * * and inquire after and concerning all persons * * * who may be liable to pay any internal revenue tax." In discharging this duty to canvass and to inquire, the Internal Revenue Service has been granted broad statutory powers to examine books and witnesses through the issuance of summonses. Thus, Section 7602(2) authorizes the Secretary or his delegate "[t]o summon the person liable for tax * * * or any other person * * * [he] may deem proper, to appear before * * * [him] * * * and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry * * *."

This case arises from the issuance of an Internal

Revenue summons in the course of an investigation of respondent who had not filed tax returns for several consecutive years. The Service attempted to reconstruct respondent's income in accordance with the well-established bank deposits method. During the course of the inquiry, the Service became aware of the existence of 20 bank accounts with substantial balances bearing names on the signature cards other than that of respondent but addresses of properties owned by respondent. These facts, coupled with frequent transfers between the accounts and the use of a post office box in respondent's name for the receipt of the bank statements, suggested that respondent was maintaining bank accounts in false names for the purpose of concealing taxable income. Hence, in order to ascertain whether respondent was in fact the true owner of the various bank accounts, the agent issued a summons requiring respondent to execute for laboratory analysis on the standard IRS handwriting exemplar form the various signatures on the bank account cards.

The decision of the court of appeals that the Internal Revenue Service has no statutory authority to issue a summons requiring a person to appear and execute handwriting exemplars in aid of a tax investigation would seriously undermine the Service's ability to insure that all federal taxes due are reported and paid. In addition to routine audits based on examination of filed tax returns, the Service must utilize other forms of scrutiny if sources of unreported income and its recipients are to be identified.

As this Court observed in a similar context in *United States* v. *Bisceglia*, 420 U.S. 141, 150 (1975), "[I]f criminal activity is afoot the persons involved may well have used aliases or taken other measures to cover their tracks." Thus, the maintenance of an alias on a bank account has always suggested that the owner has not properly reported the deposits for federal tax purposes.

Bank accounts under aliases are but one area in which handwriting exemplar summonses are commonly issued. They have also been used to determine the identities of persons who file multiple tax returns claiming fraudulent refunds, persons who purchase money orders under false names, and persons who issue false invoices. Handwriting exemplars can likewise be used to establish the authorship of gambling records and ascertain the identity of persons who forge their spouse's signature to a joint tax return to take advantage of the lower joint rates. In sum, a summons for a handwriting exemplar is a vital investigative tool in cases where, as here, a determination of the identity of the author of documents is critical to the inquiry.

B.

1. The court of appeals' ruling that the Secretary's summons power does not extend to requiring a person to appear and execute handwriting exemplars in aid of a tax investigation has no basis in the statutory text, structure or legislative history.

Pursuant to Sections 7801(a) and 7802 of the

Code, the Secretary of the Treasury, through his delegate the Commissioner of Internal Revenue, is charged with the "administration and enforcement" of the revenue laws. To this end, Section 6201(a) and 6301, respectively, provide that the Commissioner "is authorized and required to make the inquiries, determinations, and assessments of all taxes" and that he "shall collect the taxes imposed by the internal revenue laws."

Coupled with the statutory duty of the Internal Revenue Service in Section 7601 to inquire after and concerning all persons who may be liable for any internal revenue tax, this panoply of congressional directives necessarily indicates that the Treasury is authorized to issue a summons requiring a person to appear and execute handwriting exemplars. Production of such evidence is firmly grounded in each of the four broad statutory purposes for the issuance of summons: (1) ascertaining the correctness of any return; (2) making a return where none has been made; (3) determining the liability of any person for any internal revenue tax; or (4) collecting any such liability. The summons served upon respondent falls well within these statutory purposes. Respondent had not filed a return for any of the years under investigation; the Service's ascertainment of all of his bank accounts was critical to the inquiry.

The operative terms of Section 7602 speak of summoning persons "to appear before the Secretary * * * and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may

be relevant or material to such inquiry." The compulsory process authority to require a person "to appear * * * and to give such testimony as may be relevant" reasonably carries with it the power to compel a witness to exhibit specific physical characteristics such as handwriting or voice exemplars. The decisions of this Court favoring a broad interpretation of compulsory process authority to produce full disclosure of all of the facts (*United States* v. *Nixon*, 418 U.S. 683, 709 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972)) are in accord with Professor Wigmore's observation that "The testimonial duty * * * includes every form of disclosure which may assist in the ascertainment of the truth. It is not confined to utterances of the voice. It extends to documents. * * * It extends also to the *human body* and to *chattels* and *premises* possessed." 8 J. Wigmore, *Evidence*, § 2216 (8) (McNaughton rev. 1961) (emphasis in original). Hence, the execution of handwriting exemplars is an inherent element of the power to compel a witness to appear. Accord: *United States* v. *Rosinsky*, 547 F.2d 249, 252 (4th Cir. 1977).

2. While we believe that the statutory authority to compel appearance and non-privileged testimony encompasses non-privileged displays of physical characteristics such as the handwriting exemplars at issue here, the fact that Section 7602(2) authorizes the summoning of "books, papers, records, or *other data*" (emphasis added) lends further support to the proposition that the execution of handwriting exemplars is within the scope of the Service's compulsory process.

The handwriting exemplars at issue here fit within the common understanding of the phrase "other data" in this context as "information of any kind" since they will provide factual evidence that will either confirm or deny the inference that respondent maintained 20 bank accounts under assumed names. It has been held that similar statutory language—"other information" and "material" (28 U.S.C. 1826 (a))—is sufficiently broad to include handwriting exemplars. *Palmer* v. *United States*, 530 F.2d 787 (8th Cir. 1976); *In re Lopreato*, 511 F.2d 1150, 1153-1154 (1st Cir. 1975).

The inclusion of handwriting exemplars within the phrase "other data" does not, as the Sixth Circuit concluded in *United States* v. *Brown*, 536 F.2d 117 (1976), offend the statutory construction doctrine of ejusdem generis. This Court has cautioned that the doctrine cannot be employed "to render general words meaningless;" it therefore has no application where the "specific words are sufficiently comprehensive to exhaust the genus and leave nothing essentially similar upon which the general words may operate." *Mason* v. *United States*, 260 U.S. 545, 554 (1923). Here, the genus of documentary evidence already in existence is exhausted by the phrase "books, papers, [and] records." There would have been no reason for Congress to have added the general term "other data" if it were merely confined to the class of "books, papers and records." Hence, the general phrase "other data" in Section 7602 necessarily connotes the

broad range of other information material to the investigation that is within the ability of the summoned party to produce.

Nor is there any basis for the Sixth Circuit's view in *Brown*, apparently adopted by the decision below (see Pet. App. B 9a n.3), that the Service's summons authority does not extend to material that has "to be created for the examination" (536 F.2d at 122). The power to summon persons to appear and give testimony reasonably includes requiring the production of information or explanatory material in response to specific questions even though such evidence may not previously have been reduced to written form. Accord: *United States* v. *Theodore*, 479 F.2d 749 (4th Cir. 1973); *United States* v. *Turner*, 480 F.2d 272 (7th Cir. 1973); *United States* v. *Berkowitz*, 488 F.2d 1235 (3d Cir. 1973), cert. denied, 421 U.S. 946 (1975); and *United States* v. *Carter*, 489 F.2d 413 (5th Cir. 1973).

At all events, a handwriting exemplar is merely the exhibition of an "identifying physical characteristic" of the witness. *Gilbert* v. *California*, 388 U.S. 263, 266-267 (1967). As such, it is always in existence; the only creation involved is its recordation in permanent form for purposes of further study. In this respect, it is analogous to the taking of fingerprints or a photograph of a person under investigation or the required display of his person before an eyewitness for purposes of identification. If such techniques are within the scope of the Service's summons

power, the handwriting exemplars are likewise subject to compelled execution.

3. In holding that the Internal Revenue Service has no statutory authority to issue a summons compelling the execution of handwriting exemplars, the court of appeals overruled its prior decision in *United States* v. *Campbell*, *supra*, and adopted the view expressed in the dissenting opinion in that case.

But the dissent in *Campbell* was based on the erroneous premise that a summons requiring handwriting exemplars is a search and seizure within the meaning of the Fourth Amendment. As this Court made clear in *United States* v. *Dionisio*, 410 U.S. 1 (1973), and *United States* v. *Mara*, 410 U.S. 19 (1973), a grand jury subpoena requiring appearance is not a "seizure" within the meaning of the Fourth Amendment and that Amendment is not violated by a directive compelling production of "physical characteristics" that are "constantly exposed to the public" (410 U.S. at 9, 14) such as voice or handwriting exemplars. "Handwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice" (*id.* at 21). The Court therefore held in *Mara* that "[t]he specific and narrowly drawn directive requiring the witness to furnish a specimen of his handwriting violated no legitimate Fourth Amendment interest" (*id.* at 22; footnote omitted).

Given the analogy between the grand jury subpoena and the internal revenue summons most re-

cently reaffirmed by the Court in *United States* v. *Bisceglia*, *supra*, 420 U.S. at 147, there is no basis for the rejection by the dissent in *Campbell* of the precedential force of *Mara* and *Dionisio* to the question presented in the instant case. The dissenting judge in *Campbell*, whose view was adopted by the decision below, stated that the analogy was "unconvincing" because "[t]here is no direct supervision of an Internal Revenue Service investigation by a judge or other neutral judicial officer as there is of a grand jury" (524 F.2d at 609).

But just as a grand jury subpoena can be enforced only by a court, the Internal Revenue Service can compel compliance with its summonses only by invoking the jurisdiction of the federal district court. See 26 U.S.C. 7604(a). Moreover, the rules set forth in this Court's decisions in *United States* v. *Powell*, *supra*; *Donaldson* v. *United States*, *supra*; and most recently in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), for enforcement of an IRS summons, eliminate the possibility of abuse of this vital investigative tool. The analogy between the grand jury subpoena and the internal revenue summons is therefore sound. In both cases, "Congress has provided protection from arbitrary or capricious action by placing the federal courts between the Government and the person summoned." *United States* v. *Bisceglia*, *supra*, 420 U.S. at 151. The constitutional concerns evinced by the court below with respect to summoned production of handwriting exemplars are accordingly groundless.

4. The legislative history of the summons power offers further indication that Congress did not intend to exclude physical evidence such as handwriting exemplars from the scope of the summons authority or to limit enforcement to those cases where the evidence was "in existence" prior to the issuance of the summons. "Settled principles of statutory interpretation require that we avoid such a result absent unambiguous directions from Congress * * *." *United States* v. *Bisceglia, supra,* 420 U.S. at 150. The 1954 codification of the tax law included a combination of previously separate provisions authorizing the issuance of summonses with "no material change from existing law" intended. An examination of the authoritative predecessor provisions, some of which were originally enacted more than a century ago, demonstrates that the summons authority was cast in the broadest possible terms and that it was intended to extend to all constitutionally permissible information.

ARGUMENT

AN INTERNAL REVENUE SERVICE SUMMONS MAY PROPERLY BE USED TO REQUIRE A PERSON TO APPEAR AND EXECUTE HANDWRITING EXEMPLARS IN AID OF AN ADMINISTRATIVE INVESTIGATON TO DETERMINE HIS CORRECT TAX LIABILITY

A. The Type of Summons Issued in This Case Is Essential to Effective Federal Tax Enforcement

1. The question presented in this case is of great importance to the administration of the internal revenue laws. The Internal Revenue Service is organized to carry out the broad responsibilities of the Secre-

tary of the Treasury, as set forth in Section 7801 (a) of the Internal Revenue Code of 1954, to administer and enforce the internal revenue laws. See *United States* v. *LaSalle National Bank,* 437 U.S. 298, 308 (1978). Our tax collection system depends primarily upon honest self-reporting. However, in order to support and supplement accurate and conscientious self-reporting by all taxpayers, Congress has directed the Internal Revenue Service in Section 7601 of the Code "to proceed * * * and inquire after and concerning all persons * * * who may be liable to pay any internal revenue tax." As this Court observed in *Donaldson* v. *United States,* 400 U.S. 517, 523-524 (1971):

> The section thus flatly imposes upon the Secretary the duty to canvass and to inquire. This is an old statute. It has roots in the first of the modern general income tax acts, namely, the Tariff Act of October 3, 1913, § II, ¶ I, 38 Stat. 178, and prior to that, in § 3172, as amended, of the Revised Statutes of 1874.

In discharging this duty to canvass and to inquire, the Internal Revenue Service has been granted broad statutory powers to examine books and witnesses through the issuance of summonses. Specifically, Section 7602 (Appendix, *infra,* 1a-2a) authorizes the Secretary "[t]o examine any books, papers, records, or other data which may be relevant or material to such inquiry; * * * [and] [t]o summon * * * any person having possession, custody, or care of books of account * * * or any other person * * * to appear be-

fore the Secretary * * * at a time and place named in the summons and to produce such books, papers, records or other data, and to give such testimony, under oath, * * * as may be relevant or material to such inquiry; and * * * [t]o take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry." Such summonses are administratively issued, and the Internal Revenue Service can seek their enforcement in the federal courts. See Section 7402(b); see also Section 7604(a), Appendix, *infra*, 3a.

This Court has consistently recognized that effective, and therefore fair, administration of the tax laws requires that internal revenue agents not be fettered in their good faith use of the investigatory tools that Congress has provided them to determine the liability of taxpayers. In holding in *United States* v. *Bisceglia*, 420 U.S. 141 (1975), that the Internal Revenue Service has the statutory authority to issue a "John Doe" summons to a bank or other depository to discover the identity of a person who may be liable for unpaid taxes, the Court recognized the common understanding that concealment of tax evasion may involve the use of aliases and that the fundamental goal of law enforcement is to establish the identity of wrongdoers by linking particular persons with suspicious activities. As the Court stated, "[i]t would seem elementary that no meaningful investigation of such events could be conducted if the identity of the persons involved must first be ascertained, and that is not always an easy task. * * *

[I]f criminal activity is afoot the persons involved may well have used aliases or taken other measures to cover their tracks. Thus, if the Internal Revenue Service is unable to issue a summons to determine the identity of such persons, the broad inquiry authorized by § 7601 will be frustrated in this class of cases" (*id.* at 150).

In upholding the Internal Revenue Service's power to determine the identity of persons who may be liable for taxes, the Court in *Bisceglia* relied in large measure upon the well-established analogy between the Commissioner's summons power and the authority of the grand jury to compel production of evidence. As the Court noted, "had respondent been brought before a grand jury under identical circumstances there can be little doubt that he would have been required to testify and produce records or be held in contempt" (*id.* at 147). In support of this proposition, the Court cited its earlier statement in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950), quoted thereafter with approval in *United States* v. *Powell*, 379 U.S. 48, 57 (1964), that the subpoena power of federal enforcement agencies is "more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." The summons authority of the Internal Revenue Service to compel the production of evidence in either documentary or testimonial form is essentially identical to the broad

inquisitorial powers of the other federal enforcement agencies. "While the power of the Commissioner of Internal Revenue derives from a different body of statutes, we do not think the analogies to other agency situations are without force when the scope of the Commissioner's power is called into question." *United States* v. *Powell*, *supra*, 379 U.S. at 57 (footnote omitted).

Finally, the Court noted in *Bisceglia* (420 U.S. at 146) that Congress has afforded summoned parties substantial protection by providing that an internal revenue summons is not self-executing but can be enforced only by the courts. See Section 7604(a). Thus, before the Commissioner can compel the production of evidence or the appearance of a witness, the summoned party is entitled to an adversary proceeding to consider his objections to enforcement. At the hearing he "may challenge the summons on any appropriate ground." *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964). "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *United States* v. *Powell*, *supra*, 379 U.S. at 58 (footnote omitted). After reviewing the pertinent authorities, the Court in *Bisceglia* concluded (420 U.S. at 146) that "[t]he cases show that the federal courts

have taken seriously their obligation to apply this standard to fit particular situations, either by refusing enforcement or narrowing the scope of the summons." [3] In sum, "Congress has provided protection from arbitrary or capricious action by placing the federal courts between the Government and the person summoned" (*United States* v. *Bisceglia*, *supra*, *id.* at 151).

2. Like *Bisceglia*, this case arises out of an action by the Internal Revenue Service to enforce a summons seeking to establish the identity of the person responsible for participating in various suspicious financial transactions. In *Bisceglia*, the Service issued a summons to a bank requesting it to provide information as to the identity of the depositor of a substantial amount of badly deteriorated currency. Such unusual currency transactions strongly suggested that the depositor may not have properly reported the receipt of the funds for federal tax purposes. Because the identity of the potential taxpayer was unknown, the summons was issued "[i]n the matter of the tax liability of John Doe." In upholding the enforcement of such a "John Doe" summons, this Court emphasized the facts that "tax evaders are not readily identifiable" (420 U.S. at 145) and that the Internal Revenue Service "has a legitimate

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[3] See, *e.g.*, *United States* v. *Matras*, 487 F.2d 1271 (8th Cir. 1973); *United States* v. *Theodore*, 479 F.2d 749, 755 (4th Cir. 1973); *United States* v. *Pritchard*, 438 F.2d 969 (5th Cir. 1971); *United States* v. *Dauphin Deposit Trust Co.*, 385 F.2d 129 (3d Cir. 1967).

interest in large or unusual financial transactions. * * *" (*id.* at 149). The Court recognized that the process of identification is critical to effective enforcement of the tax laws, observing that "[I]f the Internal Revenue Service is unable to issue a summons to determine the identity of such persons, the broad inquiry authorized by § 7601 will be frustrated in this class of cases. Settled principles of statutory interpretation require that we avoid such a result absent unambiguous directions from Congress" (*id.* at 150).

This case involves a variation of the process of identification by the Internal Revenue Service considered in *Bisceglia*. Here, the answer to the initial question sought by the Service in *Bisceglia*—the identity of the potential taxpayer—was known. Accordingly, the summons at issue was more conventionally styled "[i]n the matter of the tax liability of [respondent] Harvey F. Euge" (A. 13). During the investigation of respondent, the agent discovered the existence of 20 bank accounts with substantial balances bearing names on the signature cards other than that of respondent but addresses of properties owned by respondent. These facts, coupled with frequent transfers between the accounts and the use of a post office box in respondent's name for the receipt of the bank statements, suggested that respondent was maintaining bank accounts in false names for the purpose of concealing taxable income.

Hence, the unknown information that the agent sought to obtain was the identity of the holders

of the various bank accounts in order to ascertain whether their true owner was in fact respondent. The technique he sought to employ was to request respondent to execute for laboratory analysis on the standard Internal Revenue Service handwriting exemplar form the various signatures on the bank account cards. The court of appeals, however, held that the Internal Revenue Service does not have "the authority under the statute here involved to compel a taxpayer to create out of thin air handwriting exemplars by using his brain, eyes and hand" (Pet. App. B 9a n.3).

As we shall discuss in greater detail *infra*, we believe that the court of appeals' refusal to enforce an internal revenue summons requiring a taxpayer to appear before a special agent and to furnish handwriting exemplars has no basis in the language and structure of the Code, which invests broad powers in the Commissioner to make the inquiries necessary to enforce the revenue laws. Our point here is that the court's apparent confinement of the statutory summons power to the production of records already in existence would seriously undermine the Service's ability to insure that all federal taxes due are reported and paid.

While the enforcement program of the Internal Revenue Service includes routine audits based upon examination of filed tax returns, a fair administration of the law also requires other forms of scrutiny if sources of unreported income and its recipients are to be identified. In most instances, unreported income cannot be ascertained from an examination

of tax returns alone. Indeed, a large number of the recipients of such income (such as respondent) fail to file any tax return. As a result, the Service necessarily must rely on other investigative techniques in order to obtain information with respect to unreported income.

Because the usual type of transaction which is cleared through one or more banks yields documentary traces, tax evaders will often employ aliases in their dealings with financial institutions. The maintenance of an alias on a bank account has always suggested that the owner has not properly reported the deposits for federal tax purposes. Thus, the existence of 20 bank accounts bearing names other than respondent's but addresses that were linked to respondent, "gave the Service good reason, and, indeed, the duty to investigate." *United States* v. *Bisceglia, supra*, 420 U.S. at 152 (Blackmun, J., concurring). It was therefore amply justified in seeking from respondent handwriting exemplars for laboratory analysis in order to determine whether he was the true owner of the accounts. "The Service's suspicion as to possible liability was more than plausible. * * * The summons, in short, was issued pursuant to a genuine investigation" (*id.* at 152 (footnote omitted) Blackmun, J., concurring).

Bank accounts under aliases of the type presented in this case are but one area in which handwriting exemplar summonses are commonly issued by the Internal Revenue Service. We are advised by the Service that the most important current use for such

summonses is to determine the identities of persons who file multiple tax returns under false names claiming income tax refunds. This type of fraudulent activity poses a serious threat to the integrity of the tax collection system.[4]

There are other situations in which handwriting exemplars are a useful investigative tool. Persons in the possession of unreported cash income will often make disbursements by purchasing money orders under false names. Given the large volume of such transactions in the average bank, bank employees will not be able to identify positively a particular taxpayer as the purchaser of money orders. In such circumstances, the Service can most effectively determine whether a person under investigation purchased such money orders by means of handwriting exemplars. See *United States* v. *Campbell*, 524 F.2d 604 (8th Cir. 1975). Similarly, other persons engaged in evading taxes may issue false invoices to their businesses which they arrange to have paid and thereafter pocket the proceeds. Comparative handwriting analyses of the invoices and checks will yield evidence of this type of activity. See *United States* v. *Rosinsky*, 547 F.2d 249 (4th Cir. 1977). Hand-

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[4] In January 1977, the Internal Revenue Service instituted a Questionable Refund Program to deal with fraudulent refund schemes. Since the beginning of 1976, the Service has detected more than 8,900 questionable returns involving refund claims of $12.3 million. See Statement of Jerome Kurtz, Commissioner of Internal Revenue Before the Subcommittee on Commerce, Consumer, and Monetary Affairs of the House Committee on Government Operations (April 25, 1979).

writing exemplars can likewise be used to establish the authorship of gambling records and thereby fix liability for income and wagering taxes.

Finally, given the disparity between the tax rates applicable to married persons filing jointly and those filing separately (Compare Sections 1(a) with 1(d) of the Internal Revenue Code of 1954), it is not uncommon for one spouse to forge the signature of an estranged spouse in order to take advantage of the lower joint rates. The need for handwriting analysis arises when the spouse whose signature is forged objects to the imposition of joint liability for taxes due. See Section 6013 of the Code. Handwriting exemplars serve either to confirm or deny the existence of such activity. See *United States* v. *Brown*, 536 F.2d 117 (6th Cir. 1976).

In light of the foregoing, it is apparent that without the power to require the execution of handwriting exemplars, the Internal Revenue Service cannot effectively conduct investigations in cases where, as here, a determination of the identity of the author of documents is critical to the inquiry.[5] A constrictive

[5] As we pointed out in our petition (page 13 and note 3), we are advised by the Internal Revenue Service that handwriting exemplars have been used in the investigation of 320 cases during the 18-month period ending on December 6, 1978. In a number of these cases, handwriting exemplars were produced voluntarily.

The question whether the Internal Revenue Service may compel the execution of handwriting exemplars is producing an increasing amount of litigation. See *United States* v. *Ginsburg*, No. C 78-6028 (E.D. Ark. Jan. 8, 1979); *United States* v. *Lewis*, 42 A.F.T.R. 5821 (N.D. Tex. July 11, 1978); *United States* v. *Hoopingarner*, 438 F. Supp. 366 (N.D. N.Y. 1977); *United States* v. *Bassman*, 40 A.F.T.R.2d 5990 (S.D. Iowa Sept. 1, 1977).

interpretation of Section 7602, limiting the use of an internal revenue summons to the production of documents already in existence, would seriously hamper a wide variety of ordinary investigations into suspected tax abuse. We turn now to an examination of the statutory language, structure, and legislative history, all of which support the validity of a properly issued summons to compel the execution of handwriting exemplars.

B. In Light of Its Language, Structure and Legislative History, the Statutory Scheme for the Issuance of Internal Revenue Summonses Indicates That a Summons Is Authorized to Require a Person to Appear and Execute Handwriting Exemplars in Aid of a Tax Investigation

1. *The statutory language and structure*

a. Pursuant to Sections 7801(a) and 7802 of the Code, the Department of the Treasury, through the Commissioner of Internal Revenue, is charged with the "administration and enforcement" of the revenue laws. Consistent with this responsibility, the Commissioner is "authorized and required," by Section 6201(a), "to make the inquiries, determinations, and assessments of all taxes * * *." Once taxes are assessed, Section 6301 directs that the Commissioner "shall collect the taxes imposed by the internal revenue laws." Finally, in order that these statutory duties may be discharged effectively, Section 7601 em-

powers the Commissioner to "cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax * * *." This broad power to canvass and inquire is the basis of the Internal Revenue Service's ability to obtain much of the information vital to successful administration and enforcement of the tax law. For, as in any other area of law enforcement, the tax collecting authorities must be able to detect and investigate suspicious activities of particular persons who may be liable for additional taxes. Fair and effective administration of our self-reporting tax system requires that the Internal Revenue Service be able to identify those persons who may owe additional taxes.

That Section 7601 immediately precedes the provision authorizing the Internal Revenue Service to issue summonses is not without significance. Indeed, this Court in *Donaldson* v. *United States, supra,* 400 U.S. at 523, recognized the close relationship between the two provisions by including Section 7601 in what it described as "the statutory structure that Congress has provided for the issuance and enforcement of an internal revenue summons." See also *Tillotson* v. *Boughner*, 333 F.2d 515 (7th Cir.), certiorari denied, 379 U.S. 913 (1964); *De Masters* v. *Arend*, 313 F.2d 79, 86-87 (9th Cir. 1963). Such summonses are thus one method available to the Service to discharge its affirmative and far-reaching duty under

Section 7601 to "inquire after and concerning all persons * * * who may be liable to pay any internal revenue tax." Nothing in the statutory phrase "inquire after and concerning all persons" suggests that the Service would not be authorized to require a person under investigation to display for examination certain physical characteristics such as handwriting or voice exemplars or to make any other constitutionally permissible forms of disclosure. To the contrary, the statutory command of Section 7601 requires the Internal Revenue Service to pursue every fruitful line of inquiry that might uncover those persons liable for additional taxes. There is no reason, we submit, to conclude that while the Service is empowered, and indeed admonished, by Congress to discover the identity of potential taxpayers, it cannot do so by using the basic investigative tool furnished it by Congress—the Internal Revenue Summons—to determine the identity of the author of documents where that fact is critical to the inquiry.

b. The language of Section 7602 is consistent with the existence of statutory authority for the issuance of a summons requiring a person to appear and execute handwriting exemplars. Production of such evidence is firmly grounded in the statutory purposes for the issuance of summonses. Section 7602 of the Code empowers the Commissioner to issue summonses in aid of four broad purposes: (1) ascertaining the correctness of any return; (2) making a return where none has been made; (3) determining the liability of any person for any internal revenue tax;

and (4) collecting any such liability. The summons served upon respondent falls well within these statutory purposes. Respondent had not filed a return for any of the years under investigation and the Service sought to reconstruct his income by means of the bank deposits method. Hence, ascertainment of all of respondent's bank accounts, including those that he may have maintained under aliases, was critical to the investigation. Once the handwriting exemplars linked respondent to the 20 bank accounts that bore his address, the Commissioner could reconstruct his income and make such returns under the second statutory purpose. See also Section 6020 of the Code. The inquiry would also encompass, in accordance with the third and fourth statutory purposes, a determination of respondent's liability for additional taxes with respect to his bank deposits and, if such taxes are owed, their collection.

The close connection between the summons at issue and the statutory purposes is reinforced by the operative terms of Section 7602. They likewise support our submission that the Internal Revenue Service is authorized to issue a summons requiring a person to appear and execute handwriting exemplars. Section 7602(2) speaks of summoning persons "to appear before the Secretary * * * and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry * * *." Section 7602(3) authorizes the Secretary "To take such testimony of the person concerned, under oath, as may be relevant or material to

such inquiry." The compulsory process authority to require a person "to appear * * * and to give such testimony * * * as may be relevant" reasonably carries with it the power to compel a witness to exhibit specific physical characteristics such as handwriting or voice exemplars. As a noted commentator has written, "The testimonial duty * * * includes every form of disclosure which may assist in the ascertainment of the truth. It is not confined to utterances of the voice. It extends to documents. * * * It extends also to the *human body* and to *chattels* and *premises* possessed." 8 J. Wigmore, *Evidence*, § 2216(8) (McNaughton rev. 1961) (emphasis in original).

These observations of Professor Wigmore are consistent with this Court's statement in *United States* v. *Nixon*, 418 U.S. 683, 709 (1974), that "The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." In *Nixon*, the Court reaffirmed the principle that " 'the public * * * has a right to every man's evidence,' except for those persons protected by a constitutional, common law, or statutory privilege * * *" *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972).

In keeping with the general policy favoring a broad interpretation of compulsory process authority, the

courts have consistently ruled that requiring the execution of handwriting exemplars is an inherent element of the power to compel a witness to appear and give testimony. Indeed, the power to compel appearance and testimony would be virtually meaningless if the witness could not be required to provide whatever evidence was not protected by a constitutional or common law privilege. For example, a court has the power on pain of contempt to compel the execution of handwriting exemplars from a person required to appear before it. See, *e.g.*, *Lewis* v. *United States*, 382 F.2d 817 (D.C. Cir. 1967). Similarly, police officers can compel the execution of such exemplars from persons within their lawful custody. See, *e.g.*, *United States* v. *Rudy*, 429 F.2d 993 (9th Cir. 1970); *United States* v. *McNeal*, 463 F.2d 1180, 1181 (5th Cir. 1972).

So here, once it is recognized that the Service had the authority to compel respondent to appear and to give testimony, it follows that it also had the power to require him to provide exemplars of his handwriting.[6] If the statute empowers the Service to compel testimony that is not protected by a constitutional or common law privilege, surely it author-

[6] In an early internal revenue summons enforcement case involving documents arising under an antecedent provision which allowed the summoning of a third party only for purposes of taking his testimony, the court below ruled that "This testimonial duty to attend and disclose applies equally to the production of documents; and the process for documents will be implied whenever testimonial compulsion in general is predicated by a statute." *Brownson* v. *United States*, 32 F.2d 844, 847 (8th Cir. 1929).

izes the execution of handwriting exemplars, which this Court has held to be the display of "an identifying physical characteristic outside [the] protection [of the Fifth Amendment]" (*Gilbert* v. *California*, 388 U.S. 263, 266-267 (1967)), and an act that violates "no legitimate Fourth Amendment interest" (*United States* v. *Mara*, 410 U.S. 19, 22 (1973)). See pages 38-39, *infra*. The testimonial duty imposed by the statute necessarily includes the compelled disclosure of every type of nonprivileged evidence that is relevant to a legitimate tax investigation. As the Fourth Circuit concluded in *United States* v. *Rosinsky*, 547 F.2d 249, 252 (1977), "The authority thus given [in Section 7602(2)] to require the witness to appear impliedly carries with it the power to require certain nontestimonial acts on the part of the witness such as providing handwriting or voice exemplars. This follows from the analogy under § 7602 to a grand jury subpoena."

There is, in sum, no reason to read the broad statutory grant of the summons authority, which extends to the compulsion of testimonial utterances (subject, of course, to proper claims of the privilege against self-incrimination), as not similarly embracing nontestimonial displays of physical characteristics such as handwriting—which are not subject to the privilege and are properly regarded as an inherent aspect of the explicitly granted authority to compel a person's appearance.

c. While we believe that the authority to compel appearance and testimony is sufficient to encompass

nonprivileged disclosures such as the handwriting exemplars at issue here, the fact that Section 7602 (2) authorizes the summoning of "books, papers, records, or *other data*" lends further support to the proposition that the execution of handwriting exemplars is within the scope of the Service's compulsory process. The common understanding of the phrase "other data" in this context is other "detailed information of any kind" or "material for an investigation * * *". See *Webster's Third New International Dictionary* 577 (1976 ed.); *Funk & Wagnalls New Standard Dictionary* 655 (1947 ed.). Surely the handwriting exemplars at issue here fit within the broad category of "information of any kind" or "material for an investigation" since they will provide factual evidence tending either to confirm or to deny the inference that arose during the Service's investigation that respondent maintained 20 bank accounts under assumed names. Accord: *United States* v. *Rosinsky*, *supra*, 547 F.2d at 253 n.3. Indeed, similar statutory language vesting the district courts with power to order the confinement of witnesses who refuse to obey orders "to testify or provide other information, including any book, paper, document, record, recording, or other material" (28 U.S.C. 1826 (a)) has been held to be sufficiently broad to include handwriting exemplars. *Palmer* v. *United States*, 530 F.2d 787 (8th Cir. 1976); *In re Lopreato*, 511 F.2d 1150, 1153-1154 (1st Cir. 1975).

Contrary to the views stated in *United States* v. *Brown*, 536 F.2d 117, inclusion of handwriting exemplars within the phrase "other data" does not offend the doctrine of statutory construction, ejusdem generis. Literally, ejusdem generis means of the same kind, class, or nature (*Black's Law Dictionary* 608 (4th ed. 1968). As this Court observed more than 40 years ago in *Gooch* v. *United States*, 297 U.S. 124, 128 (1936), "The rule of ejusdem generis, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty. Ordinarily, it limits general terms which follow specific ones to matters similar to those specified; but it may not be used to defeat the obvious purpose of legislation." See also *United States* v. *Powell*, 423 U.S. 87, 91 (1975). Here, the obvious purpose of Section 7602 is to permit the Commissioner to pursue "the broad inquiry authorized by § 7601" (*United States* v. *Bisceglia*, *supra*, 420 U.S. at 150) to "inquire after and concerning all persons * * * who may be liable to pay any internal revenue tax * * *." Absent a specific direction from Congress, there is no reason to exclude handwriting exemplars from the statutory catalogue of evidence subject to the summons power, when such evidence is essential to determine the authorship of documents—a question that can be central to the very inquiry authorized by the statute.

At all events, this Court has cautioned that the doctrine of ejusdem generis cannot be employed to "render general words meaningless;" it therefore

has no application where the "specific words are sufficiently comprehensive to exhaust the genus and leave nothing essentially similar upon which the general words may operate." *Mason* v. *United States*, 260 U.S. 545, 554 (1923). Accord: *United States* v. *Alpers*, 338 U.S. 680, 682 (1950). Here, the genus of documentary evidence already in existence is exhausted by the phrase "books, papers, [and] records." There would therefore have been no reason for Congress to have added the general term "other data" if it were merely confined to the class of "books, papers and records."[7] Hence, the general phrase "other data" in Section 7602 necessarily connotes

[7] In holding that the Service's summon's authority does not extend to handwriting exemplars, the Sixth Circuit in *Brown* relied upon the legislative history of Section 507 of the Revenue Act of 1934, ch. 277, 48 Stat. 680, 757. It concluded that Congress substituted the phrase "other data" for "memoranda" in order to authorize the Service to examine previously unavailable documents belonging to the transferors of property of a liquidated corporation to determine possible transferee liability (see 536 F.2d at 122).

But Congress made no such verbal substitution in the text of the statute. As enacted, Section 507 spoke of "books, papers, records, or memoranda bearing upon such liability." While the committee report explains that the provision was designed to give the Commissioner "the right to examine books, records, and other data to ascertain the liability of transferees of property * * *" (S. Rep. No. 558, 73d Cong., 2d Sess. 623 (1934)), the term "other data" was there employed merely as a shorthand expression to avoid setting forth the complete enumeration in the statute. The statutory text does not support the Sixth Circuit's view that the phrase "other data" is limited to specific cases of transferee liability or the inference that "other data" is equivalent to "memoranda." See page 47, note 17, *infra*.

the broad range of other information material to the investigation that is within the ability of the summoned party to produce.

Finally, there is no basis for the Sixth Circuit's view in *Brown* that the Service's summons authority does not extend to material that has "to be created for the examination" (536 F.2d at 122). See also *United States* v. *Davey*, 543 F.2d 996, 1000 (2d Cir. 1976). To begin with, the power to summon persons "to give such testimony, under oath, as may be relevant or material to such inquiry" reasonably includes the production of information or explanatory material in response to specific questions posed by a revenue agent even though such evidence may not previously have been reduced to written form. Indeed, in connection with the Internal Revenue Service's enforcement program against tax return preparers, the courts have uniformly enforced summonses seeking lists of the identities of clients without regard to whether such summaries had been in existence prior to the issuance of the summonses. See, *e.g.*, *United States* v. *Theodore*, 479 F.2d 749 (4th Cir. 1973); *United States* v. *Turner*, 480 F.2d 272 (7th Cir. 1973); *United States* v. *Berkowitz*, 488 F.2d 1235 (3d Cir. 1973), cert. denied, 421 U.S. 946 (1975); and *United States* v. *Carter*, 489 F.2d 413 (5th Cir. 1973).

Moreover, a handwriting exemplar is merely the exhibition of an "identifying physical characteristic" of the witness. *Gilbert* v. *California*, *supra*, 388 U.S. at 266-267. As such, it is always in existence;

the only creation involved is its recordation in permanent form for purposes of further study. In this respect, it is analogous to the taking of fingerprints or a photograph of a person under investigation or the required display of his person before an eyewitness for purposes of identification.[8] If, as we submit, such techniques of identification are within the scope of the Service's summons power, the handwriting exemplars are likewise subject to compelled execution.

d. Without addressing the statutory language and structure discussed above, the en banc court ruled that the Internal Revenue Service has no authority to issue a summons compelling the execution of handwriting exemplars. In so holding, the court overruled its prior decision in *United States* v. *Campbell, supra,* stating that "the view expressed in the dissenting opinion in *Campbell* is the preferable one and should be followed in this case and in the future unless the Supreme Court holds otherwise or unless Congress changes the law" (footnote omitted) (Pet. App. B 9a).

But the dissent in *Campbell* was based on the erroneous premise that a summons requiring handwriting exemplars is a search and seizure within the meaning of the Fourth Amendment. As this Court

[8] For example, if a bank official could have identified respondent as the owner of a particular account held under an assumed name, there is little doubt that the Service could have exercised its summons authority to compel respondent to appear so that the bank official could have identified him. The handwriting exemplars at issue here are comparable.

made clear in *United States* v. *Dionisio,* 410 U.S. 1 (1973), and *United States* v. *Mara, supra,* a grand jury subpoena requiring appearance is not a seizure within the meaning of the Fourth Amendment and that Amendment is not violated by a directive compelling production of "physical characteristics" that "are constantly exposed to the public" (410 U.S. at 9, 14) such as voice or handwriting exemplars. In so holding, the Court observed that the requirement that a witness exhibit such physical characteristics rested upon "the historically grounded obligation of every person to appear and give his evidence before the grand jury" (*id.* at 9-10). "Handwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice" (*id.* at 21). The Court therefore held in *Mara* that "[t]he specific and narrowly drawn directive requiring the witness to furnish a specimen of his handwriting violated no legitimate Fourth Amendment interest" (*id.* at 22; footnote omitted.)[9]

[9] Nor does the required production of handwriting exemplars violate the Fifth Amendment privilege against compulsory self-incrimination. While "[o]ne's voice and handwriting are, of course, a means of communication," the Court has held that a "mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside * * * [the] protection [of the Fifth Amendment]" *Gilbert* v. *California, supra,* 388 U.S. at 266-267 (1967). See also *United States* v. *Dionisio, supra,* 410 U.S. at 5-6.

Given the analogy between the grand jury subpoena and the internal revenue summons (see pages 19-20, *supra*), there is no basis for the rejection by the dissent in *Campbell* of the precedential force of *Mara* and *Dionisio* to the question presented in the instant case. The dissenting judge in *Campbell* stated that the analogy was "unconvincing" because "[t]here is no direct supervision of an Internal Revenue Service investigation by a judge or other neutral judicial officer as there is of a grand jury" (524 F.2d at 609).[10]

But just as a grand jury subpoena can be enforced only by a court, the Internal Revenue Service can compel compliance with its summonses only by invoking the jurisdiction of the federal district court in "'an adversary proceeding affording the opportunity for challenge and complete protection to the witness.'" *Donaldson* v. *United States*, *supra*, 400 U.S. at 525. See 26 U.S.C. 7604(a). Moreover, the rules set forth in this Court's decisions in *United States* v. *Powell*, *supra*; *Donaldson* v. *United States*, *supra*; and most recently in *United States* v. *La-*

[10] The dissent in *Campbell* also erroneously assumed that "The Internal Revenue Service, upon finding a violation of the law, is the same body which undertakes the prosecution of the taxpayer involved" (524 F.2d at 609). From this premise, it argued that "[t]hose charged with investigative and prosecutorial duties should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks" (*ibid.*). It is, of course, the Department of Justice—not the Internal Revenue Service—that is responsible for the conduct of criminal tax prosecutions. See *United States* v. *LaSalle National Bank*, *supra*, 437 U.S. at 312.

Salle National Bank, *supra*, for enforcement of an IRS summons, eliminate the possibility of abuse of this vital investigative tool.[11] The analogy between the grand jury subpoena and the internal revenue summons, reaffirmed by this Court in *Bisceglia*, is therefore sound. In both cases, "Congress has provided protection from arbitrary or capricious action by placing the federal courts between the Government and the person summoned." *United States* v. *Bisceglia*, *supra*, 420 U.S. at 151. The constitutional concerns evinced by the court below with respect to summoned production of handwriting exemplars are accordingly groundless.

[11] In support of its view that the Service's summons authority in Section 7602(2) should be "strictly construed" (524 F.2d at 608), the dissent in *Campbell* relied upon *United States* v. *Powell*, *supra*, 379 U.S. 48; and *Jones* v. *SEC*, 298 U.S. 1 (1936). But neither case stands for such a proposition. In *Powell*, the question presented was whether, after the normal three-year civil statute of limitations expired, the Service could issue a summons without establishing probable cause for believing that fraud had been committed. This Court rejected the application of a probable cause standard, holding that the Service could exercise its summons authority in the same manner as the grand jury, "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not," quoting from *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950) (379 U.S. at 57). *Powell* therefore supports the broad construction of the Service's summons authority that we urge here.

Jones v. *SEC*, *supra*, is likewise inapposite. There, the Court held that once an issuer formally withdrew its registration statement before it became effective, the SEC no longer had the statutory authority to subpoena its books and records.

2. *The legislative history*

The foregoing analysis of the statutory text as authorizing the issuance of internal revenue summonses for handwriting exemplars is also supported by the pertinent legislative history. At the time of the 1954 codification of the tax law, the report of the House Ways and Means Committee stated that the revisions of the procedural and administrative provisions "represent[ed] a substantial simplification" under which "it has been possible to combine a great number of provisions, shortening them and providing more uniform application for the various internal revenue taxes." H.R. Rep. No. 1337, 83d Cong., 2d Sess. 99 (1954). See also S. Rep. No. 1622, 83d Cong., 2d Sess. 133 (1954); 100 Cong. Rec. 3425 (1954). Specifically, the legislative history of Section 7602, the summons power, shows that Congress intended "no material change from existing law." H.R. Rep. No. 1337, *supra*, at A436; S. Rep. No. 1622, *supra*, at 617. Thus, an understanding of the scope of the earlier provisions governing the power of the Internal Revenue Service to canvass and to issue summonses is essential to any appraisal of the breadth of the present statutory structure.

As the Court noted in *Donaldson* v. *United States*, *supra*, 400 U.S. at 523-524, the duty of the Internal Revenue Service to canvass and to inquire derives from Section 3172 of the Revised Statutes of 1874. Similarly, the summons power, presently set forth in Section 7602 of the 1954 Code, also is rooted in

statutes enacted more than a century ago.[12] The legislative history of Section 7602 shows that the summons power was derived from three separate provisions, *viz.*, Sections 3614, 3615(a)-(c), and 3654 of the Internal Revenue Code of 1939.[13] While the first of these statutes originally appeared in 1919, the latter two had independent roots in Revenue Acts dating back to 1864. Each of these statutes confirms the existence of the power to compel the appearance and testimony of persons, as well as the production of every type of constitutionally permissible evidence, that might uncover unpaid tax liabilities.

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[12] Because the 1939 Code also was intended merely to codify existing law with no attempt to effect substantive changes (see, e.g., S. Rep. No. 20, 76th Cong., 1st Sess. 1 (1939)), earlier Revenue Acts must be examined in order to ascertain the meaning of specific provisions of that codification.

[13] See Table II of the 1954 Code, 68A Stat. 969, which notes that Sections 3614 and 3615(a)-(c) of the 1939 Code were essentially carried forward into Section 7602 of the 1954 Code. See also *Donaldson* v. *United States*, *supra*, 400 U.S. at 535, referring to Section 7602 as having "ascertainable roots" in Sections 3614(a) and 3615(a)-(c) of the 1939 Code. Although Table II does not contain any reference to Section 3654(a) of the 1939 Code, the inclusion of the summons power in that provision, coupled with the committee reports' statements that Congress intended no material change in existing law, strongly suggests that an examination of Section 3654(a) of the 1939 Code is necessary as an aid to understanding the current scope of the summons power. See Section 7806(b) of the 1954 Code. Moreover, the close "proximity" of Section 3654 to Sections 3614 and 3615, as the Court noted in *Donaldson* (*ibid.*), makes Section 3654 highly relevant in any consideration of the summons authority.

The first part of "existing law" before the adoption of Section 7602 in the 1954 Code, appeared in Section 3614(a) of the 1939 Code, which provided in part as follows:

> *To determine liability of the taxpayer.* The Commissioner, for the purpose of ascertaining the correctness of any return, or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

The Commissioner was first given the power to examine records and compel attendance of witnesses and take testimony in 1919 through the enactment of a virtually identical provision. Act of February 24, 1919, ch. 18, 40 Stat. 1057, 1142, Section 1305.[14]

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[14] Neither the committee reports nor the congressional debates contain any reference to the meaning of the 1919 provision.

The 1919 provision was reenacted several times before becoming part of the 1939 Code. Act of November 23, 1921, ch. 136, 42 Stat. 227, 310, Section 1308; Act of June 2, 1924, ch. 234, 43 Stat. 253, 340, Section 1004; Act of February 26, 1926, ch. 27, 44 Stat. (Part 2) 9, 113, Section 1104; Act of May 29, 1928, ch. 852, 45 Stat. 791, 878, Section 618.

The second part of the "existing law" carried forward in Section 7602 was contained in Section 3615 of the 1939 Code, which granted a summons power to the collectors by providing in pertinent part as follows:

> (a) *General authority.* It shall be lawful for the collector, subject to the provisions of this section to summon any person to appear before him and produce books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof. * * *

This section closely follows a provision first adopted in 1864, Act of June 30, 1864, ch. 173, 13 Stat. 223, 226, Section 14,[15] and reenacted several times prior to its codification in 1939.[16]

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[15] There were no committee reports on the 1864 Act.

[16] Act of July 13, 1866, ch. 184, 14 Stat. 98, 101, Section 9; Act of December 24, 1872, ch. 13, 17 Stat. 401, Section 1. In 1873 the provision was codified as part of Section 3173 of the Revised Statutes, which section was amended by Act of March 1, 1879, ch. 125, 20 Stat. 327, 330-331, Section 3; Act of August 27, 1894, ch. 16, 28 Stat. 509 557-559, Section 34; Act of October 3, 1913, ch. 16, 38 Stat. 114, 177-179; Subsec. I; Act of September 8, 1916, ch. 463, 39 Stat. 756, 773-774, Section 16; Act of February 24, 1919, ch. 18, 40 Stat. 1057, 1146-1147, Section 1317; Act of November 23, 1921, ch. 136, 42 Stat. 227, 311-312, Section 1311; Act of June 2, 1924, ch. 234, 43 Stat. 253, 344-346, Section 1018; Act of February 26, 1926, ch. 27, 44 Stat. (Part 2) 9, 117-118, Section 1115.

Finally, the third part of the "existing law" carried forward in Section 7602 of the 1954 Code is derived from Section 3654(a) of the 1939 Code, which provided as follows:

> SEC. 3654. GENERAL POWERS AND DUTIES RELATING TO COLLECTION.
>
> (a) *Collectors.*—Every collector within his collection district shall see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto. For such purposes, he shall have power to examine all persons, books, papers, accounts, and premises, to administer oaths, and to summon any person to produce books and papers, or to appear and testify under oath before him, and to compel compliance with such summons in the same manner as provided in section 3615.

This section was derived from an essentially identical provision first enacted in 1868, Act of July 20, 1868, ch. 186, 15 Stat. 125, 144, Section 49, and codified as part of Section 3163 of the Revised Statutes of 1874.

Thus, by combining Sections 3614, 3615 and 3654 into Section 7602 in 1954 without intending to change existing law, Congress continued to sanction the use of an internal revenue summons to compel the appearance and testimony of all persons who could further an investigation leading to the discovery of all those who may be liable for unpaid taxes. Like

Section 7602, all of these prior provisions cast the summons power in the broadest possible manner using terms such as "books, papers, records, or memoranda," "require the attendance of any * * * person having knowledge on the premises," "to summon any person to appear * * * to give testimony or answer interrogatories," "to examine all persons, books, papers, accounts, and premises."[17] Moreover, the expansive scope of Section 3654 of the 1939 Code, granting to the collectors the power to issue summonses for any purpose relating to their duty to oversee the faithful execution of internal revenue laws and to aid in the "prevention, detection, and punishment of any frauds," strongly supports a reading of Section 7602 as empowering the Service to discharge fully its affirmative and wide-ranging duty under Section 7601 to canvass and to inquire. Thus, the history, as well

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[17] In *Brown*, the Sixth Circuit relied on the legislative history of the 1954 Code that Congress intended no significant change in the summons power to buttress its conclusion that the phrase "other data" in Section 7602 of the 1954 Code was equivalent to the term "memoranda" in Section 3614 of the 1939 Code (see 536 F.2d at 122). But the focus of its analysis of the legislative history is too narrow. In holding that the summons power did not extend to handwriting exemplars, the court overlooked the other statutory antecedents of Section 7602 described above (see Section 3615(a) and 3654(a)) that respectively confer the authority "to summon any person * * * to give testimony or answer interrogatories" and "to examine all persons * * *." It is this aspect of the legislative history that confirms the Commissioner's broad power to compel the production of all constitutionally permissible evidence, including the handwriting exemplars at issue here.

as the text of both the current provision and its authoritative predecessors tends to refute, rather than support, the distinction made by the decision below, between a summons to compel the display of physical characteristics and one seeking production of documents already in existence (see Pet. App. B 9a, n.3). The legislative history is consistent with the general principle, which we urge here, that the Internal Revenue Service's summons authority encompasses every type of constitutionally permissible evidence, including handwriting exemplars.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 1979

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* The Solicitor General is disqualified in this case.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.

(a) *General Rule.*—The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax

or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

* * * * *

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IN THE

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OCTOBER TERM, 1978

No. 78-1453

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

HARVEY F. EUGE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1453

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

HARVEY F. EUGE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

SUMMARY OF ARGUMENT

The Internal Revenue Service ("IRS") has only those powers granted to it by Congress. It has no inherent authority to issue an administrative summons in aid of its investigations. *United States* v. *LaSalle National Bank,* 437 U.S. 298 (1978). Section

7602 authorizes the IRS to summon a person to produce "books, papers, records, or other data." The Internal Revenue Code does not expressly empower the IRS to use its summons authority to compel the creation of documents which did not previously exist, including handwriting exemplars.

The narrow question presented by this case is whether the power to summon a person to "appear" and to produce "other data" impliedly encompasses the power to compel the execution of handwriting exemplars. The larger question is the extent to which Congress has authorized the use of investigative techniques more commonly found in criminal investigations in situations which lack the safeguards of Fourth Amendment "probable cause" or authorization of compulsory process only by an impartial body such as the grand jury.

The cannons of statutory construction, such as *ejusdem generis*, suggest that the phrase "other data" is limited to like subject matter as the preceding specific enumeration of items subject to be examined and summoned ("books, papers, records"). Such a limitation does not exhaust the genus of items which may be summoned. For example, existing memoranda, tape recordings and photographs may contain information relevant to a pending tax inquiry, yet they do not fit within one of the enumerated categories. Hence, they are "other data."

This conclusion is buttressed by the legislative history of §7602 and by the history of the summons power. In enacting §7602 Congress stated that it contained "no material change from existing law." H.R. Rep. No. 1337, 83d Cong., 2d Sess. A436 (1954); S.Rep. No. 1622, 83d Cong., 2d Sess. 617 (1954). Reference to the relevant provisions of the Internal Revenue Code of 1939, and the preceding Internal Revenue Acts which it codified, confirms that the summons power is limited to existing, tangible items. For the first fifty years of its history, the IRS was limited to summoning the production of books of account, books and papers. In 1919, the power was extended to include "books, papers, records or memoranda." Int.Rev.Act of 1919, ch. 18, §1305, 40 Stat. 1057, 1142. Concurrently with that enactment, the district courts were given jurisdiction to enforce a summons calling for the production of "books, papers, records, or other data." *Id.*, §1318, 40 Stat. 1057, 1147. In no reported case prior to 1954 did the IRS ask for or receive handwriting exemplars (or any other non-testimonial evidence) or documents which were not in existence on the date of the summons.

There are good reasons to limit the use of criminal investigative techniques in administrative proceedings without the express authorization of Congress. The issuance of a summons does not require the showing of probable cause. *United States* v. *Powell*, 375 U.S. 48, 57 (1964). Hence, a taxpayer receives no pro-

tection from the Fourth Amendment, as he would if the investigation were being conducted by the police. The summons is not issued by a neutral body composed of a taxpayer's fellow citizens, as is a grand jury subpoena. Hence, he is subject to the command of an officer charged solely with the ferreting out of criminal and civil tax violations, with no intervening protecting body to safeguard his interests from abuse.

We submit that nowhere in the text of §7602, its legislative history, or the history of the summons power is there evinced an intention by Congress to grant to the IRS the power to use any constitutionally permissible investigative technique to obtain any constitutionally permissible evidence. Especially where implied powers are asserted, this Court should be careful to distinguish between the authority an agency desires and the authority an agency actually has. If the IRS needs the power to compel execution of handwriting exemplars, it should address those arguments to the Congress. The summons power remains at present, as it was in the past, limited to the production of existing documents and materials which may be relevant to the statutory purposes of the inquiry.

ARGUMENT

THE INTERNAL REVENUE SERVICE LACKS STATUTORY AUTHORITY TO COMPEL BY MEANS OF AN ADMINISTRATIVE SUMMONS THE EXECUTION OR CREATION OF DOCUMENTS THAT DO NOT ALREADY EXIST, INCLUDING HANDWRITING EXEMPLARS

A. Introduction

The narrow question presented by this case is whether Congress has given to the Internal Revenue Service ("IRS") the power to compel persons by means of an administrative summons to create documents which did not previously exist, including handwriting exemplars. Petitioners answer this question in the affirmative, based upon the broad premise that the IRS may use an administrative summons to obtain "any constitutionally permissible" information. Pet.'s Brief, p. 48. This necessarily raises the issue of the extent to which a Congressional grant of power to summon the production of books, papers, records or other data includes the power to use in administrative proceedings investigative techniques which are "constitutionally permissible" in other contexts, such as handwriting and voice exemplars, lineups and fingerprinting. The question is of great importance to the administration of the tax laws, for the IRS seeks to subject persons to substantially intrusive tech-

niques of investigation without the safeguards of either the showing of probable cause (as in criminal investigations) or authorization of the procedure by an impartial body (as in a grand jury).

The IRS is entirely a creature of statute. It has only those powers granted to it by Congress. The IRS has no inherent authority to issue an administrative summons in aid of its investigations.

We submit that on the basis of the text of Section 7602[1] and related statutes, the canons of statutory construction, the legislative history of the Internal Revenue Code of 1954, the historical development of the tax summons power and the purpose of the tax laws, Congress did not intend to grant to the IRS the full panoply of constitutionally permissible investigative techniques. Specifically, Congress did not give the IRS the power to compel citizens to create documents for the benefit of a tax investigation, including handwriting exemplars. The summons power is limited to compelling the production of existing documents and materials which may be relevant to the statutory purposes of the investigation.

[1] All statutory references are to the Internal Revenue Code of 1954, as amended, Title 26, United States Code, unless otherwise indicated.

B. The Text Of Section 7602 Does Not Authorize The Issuance Of A Summons To Compel The Creation Of Documents Including Handwriting Exemplars

The power of the Internal Revenue Service to issue an administrative summons is granted by Section 7602, which provides:

> "For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant and material to such inquiry.

The question is one of statutory construction. As Mr. Justice Frankfurter said, "Though we may not end with the words in construing a disputed statute, one certainly begins there." Frankfurter, *Some Reflections On the Reading of Statutes,* 47 Colum.L.Rev. 527, 535 (1947). Therefore, it is necessary to examine in some detail the language and structure of the statutes dealing with the summons power.

It should be noted at the outset that nothing in Section 7602 expressly authorizes the IRS to use the summons power to order a person to create or manufacture a document which does not already exist. This is particularly significant in light of other provisions of the Internal Revenue Code which do specifically empower the IRS to designate documents which taxpayers and others must fill out or maintain. *See, e.g.,* §6001 (general power to require the keeping of records, rendering of statements and making of returns) and §6107(b) (requiring tax return preparer to make and retain a list identifying the taxpayers for whom a return was prepared).

The only portions of §7602 which are relevant to this case are subsections (1) and (2).[2] Subsection (1)

[2] The preamble to §7602 sets forth the statutory purposes for which a summons may be issued. Respondent does not contend in this Court that the summons was issued for an unauthorized purpose. *Cf. United States v. LaSalle National Bank,* 437 U.S. 298 (1978). Subsection (3) relates to the taking of testimony. The giving of a handwriting exemplar is not a testimonial act. *Fisher v. United States,* 425 U.S. 391, 411 (1976); *United States v. Mara,* 410 U.S. 19 (1973).

empowers the IRS "to examine any books, papers, records, or other data" which may be relevant and material to the inquiry. None of the key words in the quoted phrase is defined by the Internal Revenue Code. Since these do not appear to be words of art, it is proper to give them their common meaning. It is not an unnatural or strained interpretation of the word "examine" to say that it is synonomous with the word "inspect." *Cf. Millard Hall,* 50 T.C. 186 (1968), *aff'd. sub. nom., Hall* v. *Commissioner,* 406 F.2d 706 (5th Cir. 1969) (no "examination" where office auditor merely discussed contents of records with appellate conferee). Since one cannot inspect something lacking a tangible form, logic dictates that the Secretary's power of examination is limited to items which presently have a physical existence.

Section 7602(2) authorizes the IRS to issue a summons to a person to produce "books, records, papers, or other data."[3] The purpose of this subsectionis to enable the IRS to compel the production of those

[3] Petitioner does not contend that the word "produce" is used in §7602 in the sense of "make" or "create." Given the purpose and context of the statute, it is apparent that the word "produce" has the meaning "to bring forward or to exhibit." *See Black's Law Dictionary,* p. 1374 (4th rev. ed. 1968).

items which the taxpayer or other person summoned refuses to produce voluntarily. It is elementary that "a section of a statute should not be read in isolation from the context of the whole [statute]." *Richards* v. *United States*, 369 U.S. 1, 11 (1962). Therefore, the items whose production may be compelled by means of a summons are the same items which may be examined under the authority of subsection (1). *United States* v. *Brown*, 536 F.2d 117, 121 (6th Cir. 1976).

"Books" generally refers to books of account, or similar formal records of financial transactions. *Cf. Hall* v. *Commissioner, supra; Geurkirk* v. *United States*, 354 F.2d 629, 631 (7th Cir. 1965) (construing §7605(b)); *In re Anderson*, 35 F.Supp 717, 719 (W.D.N.Y. 1940) (ledger of assigned accounts). The word does not refer to preliminary documents, such as trial balance sheets [*e.g., Jones* v. *Ralston Purina Co.*, 358 S.W.2d 772, 778 (Mo. 1962)] or informal records, *e.g., Klempner* v. *Glenn*, 82 F.Supp. 626 (W.D.Ky. 1949) (construing §41 of Int. Rev. Code of 1939). This interpretation is in accord with the history of the summons powers, which was originally limited to "books of account." *See, infra*, Part C.

"Papers" refers to a broader class of documents. Generally, the courts have said that papers relate to specific transactions, and include such items as deeds, contracts, plans, specifications, instruments, checkbooks, check stubs, cancelled checks and similar writings. *Cudahy Packing Co.* v. *United States*, 15 F.2d 133, 136 (7th Cir. 1926); *In re Hodge*, 205 F. 824, 825 (N.D.N.Y. 1913).

"Records," like "books," usually have reference to "serial, continuous and more permanent memorials of a concern's business and affairs, chronologically and systematically kept and arranged." *Cudahy Packing Co.* v. *United States, supra* at 136. More recently in *Nichols* v. *United States*, 325 F.Supp. 130, 134-135 (D. Kan. 1971), *aff'd.*, 460 F.2d 671 (10th Cir.), *cert. den.* 409 U.S. 966 (1972), a district court held that records meant written matter used to perpetuate knowledge of acts or events. *Nichols* was an action under the Freedom of Information Act, 5 U.S.C. §552, *et seq.*, to obtain access to various items being held by the National Archives relating to the assassination of President Kennedy, including certain personal property (*e.g.*, rifle, bullets, coat, etc.), histological preparations used in the autopsy, and written diagnoses or findings. Using the above-mentioned definition, the district court held that only the latter items were properly "records," within the meaning of the Act.

"Data" is the plural of "datum." It is commonly defined to mean "detailed information of any kind" or more simply, "information." Webster's *Third New International Dictionary*, 577 (1976 ed.). This is a rather vague and inconclusive term, which carries with it no suggestion that it refers to anything other than extant items. That reasonable persons can disagree as to the coverage of this term is illustrated by the divergence of the courts of appeal upon the very issue presented by this case. *Compare United States* v. *Brown, supra*, and *United States* v. *Davey*, 543 F.2d

996, 1000 (2d Cir. 1976) *with United States* v. *Rosinsky*, 547 F.2d 247, 253 (4th Cir. 1977) and *United States* v. *Campbell*, 524 F.2d 604 (8th Cir. 1975).

Hence, it is appropriate to resort to other aids to determine the meaning of the phrase "other data." Useful tools in the search for meaning of statutes are the well-known canons of construction. They are, of course, in no true sense rules of law. They are, at best, as Mr. Justice Holmes called them, "axioms of experience." *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 48 (1928). Intelligently applied, the canons of construction can throw valuable light upon the interpretation of the statute. *See Frankfurter, op. cit.* at 544-45. In this case, the principles of statutory construction suggest that Congress did not grant to the IRS the power to compel the creation of documents, including the execution of handwriting examplars.

One of the best known canons is the doctrine of *ejusdem generis* which states:

> [W]here general words follow specific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. 2A Sutherland, *Statutes and Statutory Construction*, §47.17, p. 103 (4th ed. 1973).

Use of *ejusdem generis* is proper when the following five conditions are met: (1) there exists an enumeration by specific words; (2) the members of the enumeration constitute a class; (3) the class is not exhausted by the enumeration; (4) the general reference supplements the enumeration, usually following it; and (5) there exists no clearly manifested intent that the general term is to be given broader meaning than the doctrine requires. 2A Sutherland, *op. cit.*, §47.16, p. 109. The summons statute satisfies these prerequisites.

Section 7602 contains a listing of specific enumerated items ("books, papers, records") and concludes with a general term ("other data"). The enumeration constitutes a class consisting of tangible items already in existence. *See United States* v. *Brown*, *supra*, at 122; *United States* v. *Campbell*, *supra*, at 606. The general reference supplements the enumeration and follows it.

Petitioners suggest that the doctrine is inapplicable for failure to meet the third and fifth requirements. According to Petitioners, the genus of documentary evidence is exhausted by the enumeration of "books, papers [and] records." Pet.'s Brief on Merits, p. 36. Thus, the argument goes, there is nothing "essentially similar upon which the general words may operate" and the general words are rendered meaningless. *Id.* Petitioners' statement of the law is correct, but their factual premise is not.

There are a number of tangible, existing items which may be summoned, which nevertheless do not fall within the meaning of "books, records [or] pa-

pers." Hence, they must be "other data." Most obvious are "memoranda", or other informal writings or memorials of events or actions. The predecessor statutes to §7602 included memoranda in the specific enumeration of items which could be summoned. See Part C, *infra.* Another item of "other data" would be existing handwriting examplars. Indeed, the IRS has available to it handwriting exemplars executed by Respondent in connection with another investigation which it has not attempted to utilize. R. 18, 33-34, 37. Enumeration of other items is limited only by the imagaination. For example, photographs of property for which the taxpayer claims a casualty loss may be useful in reaching a value for the property. *See* §165. Tape recordings of meetings or telephone calls, to the extent they exist, could be useful to determine whether particular transactions were valid or a sham. *Cf., United States* v. *Nixon,* 418 U.S. 683 (1974).

The Congressional intent in enacting §7602 is clearly manifested in the brief legislative history of the statute, which states "[this section] contains no material change from existing law." H.R.Rep. No. 1337, 83d Cong., 2d Sess. A436 (1954); S.Rep. No. 1622, 83d Cong. 2d Sess. 617 (1954). Existing law authorized a summons to compel the production of "books, papers, records, or memoranda" (§3614, Int.Rev. Code of 1939), "books" (§3615(a), Int. Rev.Code of 1939) and "books and papers" (§3654(a), Int.Rev. Code of 1939). All of these enumerated items refer to tangible, existing documents. No provision of the 1939 Code can

fairly be said to authorize a summons to compel the execution of a handwriting exemplar, or to create any other document. Clearly, the interpretation suggested by Petitioners, *i.e.,* "other data" equals "any constitutionally permissible information," would be a radical and material departure from prior law. Only by limiting the class of items to be summoned to existing things can the Congressional intent of preserving the meaning of prior law be effectuated.

Other canons of construction may also be useful here. For example, the rule of *noscitur a sociis* states:

> If the legislative intent or general meaning of a statute is not clear, the meaning of doubtful words may be determined by reference to their association with other associated words or phrases. Thus, where two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the special word. 2A Sutherland, *op. cit.,* §47.16, p. 101.

Applying this principle, the general words "other data" are limited by the special words "books, papers [and] records" to similar, *i.e.,* tangible and existing, items. In another case involving agency subpoenas, this Court applied the canon of *noscitur a sociis* to hold that the power of the Interstate Commerce Commission to inspect "accounts, records and memoranda" did not encompass the power to inspect "correspondence." *United States* v. *Louisville & N. R. Co.,* 236 U.S. 318 (1915).

In addition, the rule of construction known as *in pari materia* suggests that other statutes relating to the same subject matter may be of assistance in determining the meaning of a particular statute. For example, Sutherland notes that statutes which condemn the same acts are *in pari materia*. 2A Sutherland, *op. cit.* §51.03, p. 299. Section 7604(b) provides for an order of attachment as for a contempt when a person duly summoned under §7602 neglects or refuses to produce books, papers, records or other data. Section 7210 makes it a crime to neglect to produce "books, accounts, records, memoranda, or other papers" duly summoned.[4] Clearly, each of these items contemplates matters already in existence. Thus, the power to summon "other data" should be no broader than the power to punish a contumacious failure to comply.

Significantly, Petitioners do not assert that it has been the longstanding practice of the IRS to use an administrative summons to obtain non-testimonial evidence. *Cf. International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. ____, 58 L.Ed.2d 808, 820 (1979). The statistics cited by Petitioners in their brief go back only to mid-1977. Pet.'s Brief, p. 26 n.5. Petitioners have cited no reported case, and our research

[4] Neither section applies when the witness interposes good faith defenses to the summons. *Reisman v. Caplin*, 375 U.S. 440, 447-49 (1964). In *United States v. Becker*, 259 F.2d 869 (2d Cir. 1958), it was held that the government must prove a "wilful" failure to comply under §7210.

has revealed none, in which the IRS sought any type of non-testimonial, physical evidence prior to *United States* v. *Campbell*, 390 F.Supp. 711 (D.S.D. 1975), *aff'd*, 524 F.2d 604 (8th Cir. 1975).

The IRS has itself taken inconsistent positions concerning its powers under §7602. In this case it claims to be able to compel the execution of handwriting exemplars. However, the Internal Revenue Manual §5892.41(3) (November 22, 1978) states that an administrative summons

> should not require the witness to do anything other than to appear on a given date to give testimony and to bring with him/her existing books, papers, and records. A witness cannot be required to prepare or create documents, including tax returns, not currently in existence.

The manual elsewhere states that the execution of handwriting exemplars is not the preparation or creation of a document. Internal Revenue Manual §4022.64(4) (March 28, 1977). It is apparent, however, that a handwriting exemplar is a document and does not come into existence unless the person summoned manufactures it. *United States* v. *Brown*, *supra* at 122.

Petitioners do point to cases such as *United States* v. *Theodore*, 479 F.2d 749 (4th Cir. 1973), in which the court ordered a tax return preparer to make a list of the identity of his clients, apparently without regard to whether such lists were in existence prior to

the issuance of the summons. Pet.'s Brief, p. 37. However, it appears that those decisions did not consider the contention that the IRS lacked the power to compel the making of documents through the use of an administrative summons. That particular issue with respect to tax return preparers is now moot in view of the enactment of §6107(b) which requires them to maintain such lists.

C. The Legislative History And Historical Development Of The Summons Power Indicates That Section 7602 Does Not Authorize The Issuance Of A Summons To Create Documents

The foregoing analysis of the text of §7602 is buttressed by the legislative history of that and related statutes, and by the historical development of the summons power. The legislative history of §7602 is brief, but definite. Both committee reports state that "[Section 7602] contains no material change from existing law." H. R. Rep. No. 1337, 83d Cong., 2d Sess. A436 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 617 (1954). Thus, an understanding of the historical antecedents of the summons statutes is necessary to determine the present scope of the summons power.

The highlights of the historical development of the summons power are summarized by the following tables:

TABLE A

STATUTORY DEVELOPMENT OF IRS ADMINISTRATIVE SUMMONS POWER, 1864-1979

Items Which May Be Examined and Summoned	Jurisdiction of District Court to Enforce Summons
1. "books of account" Int. Rev. Act of 1864, §14 Rev. Stat. 1873-74, §3173 "books, papers, accounts" and "books and papers" Int. Rev. Act of 1868, §49 Rev. Stat. 1873-74, §3163	application to district court for attachment as for contempt Int. Rev. Act of 1864, §14 Rev. Stat. 1873-74, §3175 [compare Int. Rev. Code of 1954, §7604(b)]
2. "books of account" Int. Rev. Act of 1913, §I Int. Rev. Act of 1916, §16	"production of books" Int. Rev. Act of 1913, §K Int. Rev. Act of 1916, §20

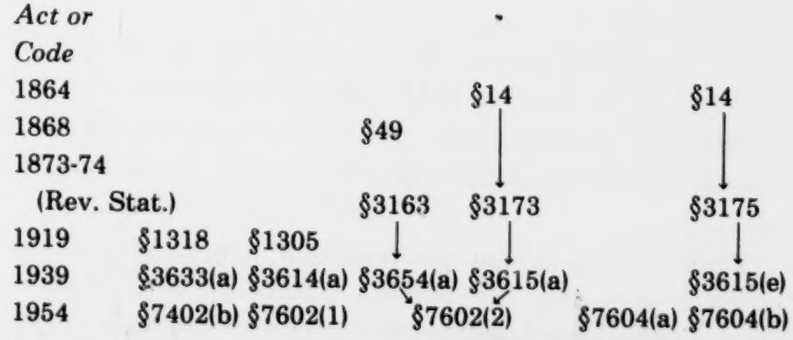
Items Which May Be Examined and Summoned	Jurisdiction of District Court to Enforce Summons
3. "books, papers, records or memoranda" Int. Rev. Act of 1919, §1305 Int. Rev. Act of 1921, §1308 Int. Rev. Act of 1924, §1004 Int. Rev. Act of 1926, §1104 Int. Rev. Act of 1928, §618 Int. Rev. Act of 1934, §507	"books, papers or other data" Int. Rev. Act of 1919, §1318 Int. Rev. Act of 1921, §1310(a) Int. Rev. Act of 1924, §1025(a) Int. Rev. Act of 1926, §1122(a) Int. Rev. Act of 1928, §617(a)
4. "books, papers, records, or memoranda" Int. Rev. Code of 1939, §§3614 (a), (b) "books" Int. Rev. Code of 1939, §3615(a) "books and papers" Int. Rev. Code of 1939, §3654(a)	"books, papers, or other data" Int. Rev. Code of 1939, §3633(a)

Items Which May Be Examined and Summoned	Jurisdiction of District Court to Enforce Summons
5. "books, papers, records, or other data" Int. Rev. Code of 1954, §7602	"books, papers or other data" Int. Rev. Code of 1954, §7402 (b) "books, papers, records, or other data" Int. Rev. Code of 1954, §7604(a)

Note: For clarity, complete citations are contained in the Table of Cases, Statutes and Other Authorities)

TABLE B

DERIVATION OF SUMMONS STATUTES



(Source: Table II, Int. Rev. Code of 1954, 68A Stat. 969)

In this Court's most recent opinion on the subject of IRS summonses, *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), it was noted that "Section 7602 derives, assertedly without change in meaning, from corresponding and similar provisions in §§3614, 3615, and 3654 of the 1939 Code." *Id.* at 310.[5] The Court relied heavily upon the historical antecedents of §7602 in concluding that Congress intended to permit administrative investigations of tax fraud with interrelated criminal and civil elements. *Id.* at 310-311 and nn. 13-14. Even those decisions which have sustained Petitioners' arguments have agreed that the 1939 Code authorized the summoning only of documents or items presently in existence. *See, e.g. United States* v. *Campbell, supra* at 606.

The contention that the phrase "other data" used in Section 7602 applies only to tangible, existing items is further supported by an examination of the statutory development of Sections 7402(b) and 7604(a). These sections confer jurisdiction upon the district court to enforce an IRS summons. Section 7402(b) differs slightly in wording from Section 7604(a). The former authorizes the district court to compel the production of "books, papers, or other data," while the latter uses the words "books, papers,

[5] Interestingly enough, the "assertion" was made by the government in *LaSalle*. *See* Petitioner's Brief, pp. 20-29, where the government, after an exhaustive review of the history of the summons power, concluded that Section 7602 remained unchanged in meaning from preceding statutes.

records, or other data." Both statutes derive from Section 3633 of the Internal Revenue Code of 1939, which provided:

> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, *or other data*, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, *or other data*. (Emphasis added).

Section 3614 of the 1939 Code authorized the IRS to examine "books, papers, records, or memoranda." Both the *Brown* and the *Campbell* courts agreed that this phrase contemplated existing, tangible documents. *United States* v. *Brown, supra* at 122; *United States* v. *Campbell, supra* at 606.

Sections 3615(a) and 3654(a) contained the summons provisions of the 1939 Code. The former authorized the IRS to

> summon any person to appear before [the collector] and *produce books* at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or other returns thereof. (Emphasis added.)

The latter provided:

> (a) *Collectors*—Every collector within his collection district shall see that all laws and regulations relating to the collection of internal

> revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection and punishment of any frauds in relation thereto. For such purposes, he shall have power to examine all persons, *books, papers, accounts,* and *premises,* to administer oaths, and to summon any person to produce *books* and *papers,* or to appear and testify under oath before him, and to compel compliance with such summons in the same manner as provided in section 3615. (Emphasis added.)

Although these statutes specifically mentioned only "books" and "papers" as the type of items which would be summoned, the courts have referred to the broader language of Sections 3614 and 3633 to determine the scope of the summons. For example, in *Stone* v. *Frandle,* 89 F.Supp. 222 (D. Minn. 1950), the taxpayer contended that the government could not summon stenotype notes of an arbitration proceeding because they were not books of account or the underlying documents which were reflected in such books. The court rejected this position and held that the government could require the production of "any writings or data which may bear upon the matter." *Id.* at 224. *Cf. Brownson* v. *United States,* 32 F.2d 844 (8th Cir. 1929) (production of telegram). The use of the word "data" in conjunction with the word "writing" suggests that the court considered them equivalent. Certainly nothing in the 1939 Code, or the cases decided under it, indicates that the language used there was intended to encompass intangible, non-testimonial evidence.

Moreover, the use of the phrase "other data" in the 1954 Code was not an innovation. It appeared in Section 3633(a) of the 1939 Code which, as noted previously, was the statute conferring jurisdiction upon the district court to enforce a summons. The 1939 Code was a codification of previous revenue acts,[6] which also used the phrase "other data." The district court's jurisdiction under the 1939 Code to compel production of "other data" could not exceed the power of the IRS to examine and summon documents. Therefore, "other data" as used in the 1939 Code, must have meant books, papers, records, memoranda and other items of a like nature. This is the position taken by the courts which enforced summons for such things as stenotype notes and telegrams.

Consequently, when Congress added the phrase "other data" to Section 7602 in 1954, it did not do so without a point of reference. The use of this much-disputed phrase not only made all the statutes related to summons uniform in phraseology, but also obviated such arguments as those put forth in *Stone* v. *Frandle, supra.* There was no attempt to broaden the reach of an IRS summons, despite the contrary assertions by Petitioners. The term had long been a part of the interal revenue acts and had an accepted meaning. Thus, Respondent respectfully suggests that Congress be taken at its word when it said the inclusion of the phrase "other data" in Section 7602 was not a material change from existing law.

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[6] S.Rep.No. 20, 67th Cong., 1st Sess. 1 (1939).

D. Section 7602 Authorizes The Use Of An Administrative Summons To Compel A Person To Appear Before the IRS Only For The Purpose Of Producing Books, Papers, Records Or Other Data, And For The Purpose Of Giving Testimony

Petitioners suggest that Section 7602 authorizes an administrative summons to be issued to compel the mere appearance of a witness, without also compelling him to produce documents or to testify. Pet.s' Brief, pp. 30-33, 38. Inherent in this authority to require a mere appearance, Petitioners contend, is the authority to require that certain non-testimonial acts be done, such as giving handwriting exemplars, voice exemplars, standing in a lineup or trying on clothes for the purpose of identification. Pet.s' Brief, pp. 30-33, 38 n.8; *see also United States* v. *Rosinsky*, 547 F.2d 249, 252 (4th Cir. 1977). However, this is a misreading of the relevant statutes.

Section 7602 has three subsections. Section 7602(1) authorizes the IRS to examine "books, papers, records, or other data." Section 7602(3) authorizes the IRS to take the testimony of a person summoned. Neither of these subsections expressly authorizes the IRS to require non-testimonial acts such as the giving of handwriting or voice exemplars, standing in a lineup or trying on clothes. The only non-testimonial act which the person summoned must perform is the production of books and records. *Cf. Fisher* v. *United States*. 425 U.S. 391 (1976). In connection with the

government's power to examine books and witnesses granted by subsections (1) and (3), Section 7602(2) authorizes the issuance of a summons to compel a person

> *to appear* before the Secretary at a time and place named in the summons *and to produce* such books, papers, records, or other data, *and to give such testimony*, under oath, as may be relevant and material to such inquiry. (Emphasis added).

The structure and literal wording of the statute makes clear that a person's appearance can be compelled only to produce documents or to testify. The giving of handwriting exemplars is not "testimony." *United States* v. *Mara*, 410 U.S. 19 (1973).

Sections 7402(b) and 7604(a) likewise do not support Petitioner's contention. It is true that these sections give the district court jurisdiction to order a person "to appear" in compliance with a summons. However, the courts have interpreted this to mean that the witness may not ignore the administrative summons. That is, he must go before the summoning officer and make some sort of response. The witness may interpose good faith defenses to the summons and wholly refuse to testify or produce documents before the summoning officer. *Reisman* v. *Caplin*, 375 U.S. 440, 445 (1964). If the government wishes to enforce the summons it must seek the aid of the district court. *Id.* at 445-446.

If the witness wholly fails to appear before the IRS in response to the summons, the government may ask

the District Court "for an attachment against him as for a contempt" pursuant to Section 7604(b).[7] However, this statute was "intended only to cover persons who were summoned and *wholly made default* or contumaciously refused to comply." *Reisman* v. *Caplin*, *supra*, at 448-449 (emphasis added). Cf. §§7402(b) and 7604(a) (district court has jurisdiction to compel "attendance").[8] Therefore, the power to compel a person to appear pursuant to an administrative summons does not include the power to compel the person to perform non-testimonial acts other than the production of documents.

E. An Internal Revenue Agent Does Not Have Powers To Compel Non-testimonial Evidence Analogous To Those Of A Grand Jury

Petitioners' reliance upon previous decisions of this Court drawing an analogy between certain aspects of

[7] A willful refusal to appear before the summoning officer may be a crime. 26 U.S.C. §7210; *Reisman* v. *Caplin*, supra at 447; *United States* v. *Becker*, 259 F.2d 869 (2d Cir. 1958).

[8] A similar procedure is in fact what was followed in this case. Respondent not only failed to appear before the Special Agent who issued the summons, he also failed initially to appear before the district court in response to the Order to Show Cause. R. 12, 15. An order for his arrest was issued pursuant to §7604(b). R. 15. He was taken into custody and subsequently released after counsel was appointed to represent him and a date for a hearing was set. R. 16.

grand jury investigations and tax investigations by Internal Revenue agents is inappropriate in this case. As Mr. Justice Stewart pointed out in *United States* v. *Bisceglia*, 420 U.S. 141, 159 (1975) (dissenting opinion):

> The IRS is not a grand jury. It is a creature not of the Constitution but of legislation and thus peculiarly subject to legislative constraints. [Citations omitted]. It is true that the Court drew an analogy between an IRS summons and a grand jury subpoena in *United States* v. *Powell*, 379 U.S. 48, 57, but this was merely to emphasize that an IRS summons does not require the support of "probable cause" to suspect tax fraud [before it may be issued].

This Court made clear in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978) that the power of the IRS to issue an administrative summons under §7602 is more limited than its responsibility to enforce the Internal Revenue Code imposed upon it by §§ 7601, 7801 and 7802.[9] The Secretary is charged with duties that "encompass enforcement of both civil and criminal statutes." *Id.* at 308. Yet the "summons authority does not exist to aid criminal investigations only." *Id.* at 317 n.18. The opinion further reaffirmed

[9] The proximity of the statute authorizing the IRS to canvass, §7601, to the summons statutes is without legal significance. Section 7806(b) explicitly states: "No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title. . . ."

the principle that the IRS "does not enjoy inherent authority to summon production of the private papers of citizens. It may exercise only that authority granted by Congress." *Id.*

Viewed in this context, we submit that this Court should be especially cautious in finding an implied grant of power to agents of the IRS to use methods common to criminal investigations, where the inquiry may lead to use of the evidence in a civil case. *Cf. United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958). This is particularly true where the IRS asserts the right to use those implied powers in situations which lack the procedural and substantive safeguards afforded citizens who are detained by the police or subpoenaed by a grand jury.

A person's constitutional rights are not violated by taking his fingerprints against his will. *United States* v. *Dionisio*, 410 U.S. 1, 11 (1973). Nevertheless, the police may not detain a person for the sole purpose of taking his fingerprints without having probable cause for the detention. *Davis* v. *Mississippi*, 394 U.S. 721 (1969). The IRS, however, may in effect "detain" a person through the use of an administrative summons without the necessity of showing probable cause. *United States* v. *Powell*, *supra* at 57. These "detentions" may be a substantial intrusion upon a person's activities. *Cf. United States* v. *Bassman*, 40 A.F.T.R.2d 77-5990 (S.D. Iowa Sept. 1, 1977) (taxpayer required to furnish 1500 handwriting exemplars, later reduced to 960 exemplars). Yet the summoned

person lacks the not insubstantial safeguards afforded by the Fourth Amendment which would otherwise be available if the police attempted to secure the same nontestimonial evidence.[10]

The use of an administrative summons to compel non-testimonial evidence (except for the production of books and papers) likewise lacks the important historical safeguards afforded citizens by the grand jury system. In the first place, a grand jury is a neutral body. As Mr. Justice Black said in *In re Groban*, 352 U.S. 330, 346-347 (1957):

> The traditional English and American grand jury is composed of 12 to 23 members selected from the general citizenry of the locality where the alleged crime was commited. They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law enforcement officer ferreting out crime. It would be

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[10] For this reason, cases such as *Lewis* v. *United States*, 382 F.2d 817 (D.C. Cir. 1967), *United States* v. *Rudy*, 429 F.2d 993 (9th Cir. 1970) and *United States* v. *McNeal*, 463 F.2d 1180 (5th Cir. 1972) are not apposite here. The existence of a pending criminal prosecution or a finding that a person was in the lawful custody of the police necessarily implies the existence of sufficient probable cause to satisfy the Fourth Amendment. These cases do not suggest that the compulsion of handwriting exemplars would be proper where there was no probable cause to believe the defendant had committed a crime.

> very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. Similarly the presence of the jurors offers a substantial safeguard against the officers' misrepresentation, unintentional or otherwise, of the witness' statements and conduct before the grand jury. The witness can call on the grand jurors if need be for their normally unbiased testimony as to what occurred before them. (Black J., dissenting).

It is true that one of the roles of the grand jury, like that of the Intelligence Division of the IRS,[11] is to investigate suspected crimes. However, the grand jury has an additional role which is not shared by the IRS: to protect individuals against unfounded or malicious criminal accusations. *See* Orfield, *The Federal Grand Jury,* 22 F.R.D. 343, 394 (1959). As one court has said, "The Grand Jury earned its place in the Bill of Rights by its shield, not by its sword." *United States* v. *Cox,* 342 F.2d 167, 186 (5th Cir.) (Wisdom, J., concurring specially), *cert. denied,* 381 U.S. 935 (1965). *See also Stirone* v. *United States,* 361 U.S. 212 (1960); *Hale* v. *Henkel,* 201 U.S. 43, 59 (1906). One of the principal reasons for allowing a grand jury to subpoena non-testimonial evidence is to fulfill its purpose as a "shield." As the Court said in *United States* v. *Dionisio, supra* at 17-18:

> The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not touch upon the legitimate rights of any witness called before it.

The IRS, and particularly a Special Agent in the Intelligence Division, fulfills an entirely different role. The agent's job is to investigate suspected criminal violations and prepare a case for prosecution. R. 30; *see* Internal Revenue Manual 9900, *Handbook for Special Agents* 9900 ¶210 (March 1, 1977). While it is true that a case proceeds through many levels of review before being recommended for prosecution, *United States* v. *LaSalle National Bank, supra* at 315, the overriding purpose of this procedure is to identify the strongest cases for prosecution. Any protection afforded the target of such an investigation by the review process is merely incidental to its primary purpose of deciding which cases should be recommended for criminal prosecution.

The Department of Justice and United States Attorneys actually conduct the trials. 28 U.S.C. §547(1). However, the IRS is hardly a disinterested bystander. As one court has said, "The Department of Justice

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[11] The Intelligence Division has since been redesignated the Criminal Enforcement Division. IRS News Release, February 6, 1978.

depends upon the IRS entirely for the investigation of tax crimes, and all tax prosecutions are undertaken only upon the recommendation of the IRS." *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464, 475 (E.D. Pa. 1971). The Internal Revenue agent who originally investigated the case (and issued the summons, if any) is frequently the principal prosecution witness. *E.g., Scanlon* v. *United States*, 223 F.2d 382 (1st Cir. 1955). In complicated cases, the IRS provides technical assistance to the prosecutors and the grand jury. *See, e.g., In re April 1977 Grand Jury Subpoena*, 573 F.2d 936 (6th Cir.), *rev'd on rehearing en banc*, 584 F.2d 1366 (6th Cir.), *cert. den.*, ____ U.S. ____, 99 S.Ct. 1277 (1978).

Section 7602 contains no sweeping language which evidences a purpose by Congress to grant to the IRS the use of any constitutionally permissible investigative technique to obtain any constitutionally permissible evidence. *United States* v. *Brown, supra* at 122. On the other hand, Congress recently enacted §7609, which placed certain pre-issuance restrictions upon third party and so-called "John Doe" summons. This was done in direct response to the decision in *United States* v. *Bisceglia, supra*, and evidences a Congressional concern that a tax summons "should not unnecessarily impinge upon the civil rights of taxpayers, including the right to privacy." S.Rep. No. 94-938 (Part I), 94th Cong., 2d Sess. 368 (1976). In view of the differing roles of the grand jury and the Internal Revenue agent, it is appropriate to place a more limited construction upon the powers of the latter.

There is a vital difference between the powers the IRS would like to have and the actual powers granted to it by Congress. The desirability of having the power to compel the execution of handwriting exemplars is an argument more properly addressed to Congress, rather than the courts.

If Congress failed to grant the power which the IRS seeks in this case, wheter deliberately or otherwise, that lack cannot be judicially supplied "however much later wisdom may recommend the inclusion." *Frankfurter, op. cit.* at 534. As Mr. Justice Brandeis observed in another tax case: "What the Government asks is not a construction of the statute, but, in effect, an enlargement of it by the court, so that what was omitted . . . may be included within its scope." *Iselin* v. *United States*, 270 U.S. 245, 251 (1926).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted

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APPENDIX

APPENDIX

Internal Revenue Code of 1954, Title 26, United States Code:

§7402. Jurisdiction of Courts.

(b) To Enforce Summons.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

§7210. Failure to Obey Summons

Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections 7602, 7603 and 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

§7602. Examination of Books and Witnesses

For the purposes of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liabil-

ity at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

§7604. Enforcement of Summons

(a) *Jurisdiction of district court*—If any person is summoned under the internal laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records or other data.

(b) *Enforcement*—Whenever any person summoned under section * * * 7602 neglects or refuses to obey such summons, or to produce books, papers, records or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

Internal Revenue Code of 1939:

§3614. Examination of Books and Witnesses

(a) *To determine liability of the taxpayer.* The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employer of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be

included in the return or of any officer or employee of such person, or in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

(b) *To determine liability of transferee.* The Commissioner, for the purpose of determining the liability at law or in equity of a transferee of the property of any person with respect to any Federal taxes imposed upon such person, is hereby authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon such liability, and may require the attendance of the transferor or transferee, or of any officer or employee of such person, having knowledge in the premises, and may take his testimony with reference to the matter, with power to administer oaths to such person or persons.

§3615. Summons From Collector to Produce Books and Give Testimony

(a) *General Authority.* It shall be lawful for the collector, subject to the provisions of this section to summon any person to appear before him and produce books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof. The collector may summon any person residing or found within the State or Territory in

which his district lies; and when the person intended to be summoned does not reside and can not be found within such State or Territory he may enter any collection district where such person may be found and there make the examination herein authorized. And to this end he may there exercise all the authority which he might lawfully exercise in the district for which he was commissioned.

* * *

(e) *Enforcement.* Whenever any person summoned under this section neglects or refuses to obey such summons, or give testimony, or to answer interrogatories as required, the collector may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

§3633. Jurisdiction of District Courts

(a) *To enforce summons.* If any person is summoned under the internal revenue laws to appear,

to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

§3654. General Powers And Duties Relating To Collection

(a) *Collectors*—Every collector within his collection district shall see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection and punishment of any frauds in relation thereto. For such purposes, he shall have power to examine all persons, books, papers, accounts, and premises, to administer oaths, and to summon any person to produce books and papers, or to appear and testify under oath before him, and to compel compliance with such summons in the same manner as provided in section 3615.